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Scrutinizing the Second Amendment

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SCRUTINIZING THE SECOND AMENDMENT

Adam Winkler*

One overlooked issue in the voluminous literature on the Second Amendment is what standard of review should apply to gun control if the Amendment is read to protect an individual right to bear arms. This lack of attention may be due to the assumption that strict scrutiny would necessarily apply because the right would be “fundamental” or because the right is located in the Bill of Rights. In this Article, Professor Winkler challenges that assumption and considers the arguments for a contrary conclusion: that the Second Amendment’s individual right to bear arms is appropriately governed by a deferential, reasonableness review under which nearly all gun control laws would survive judicial review. Professor Winkler’s discussion is informed by the example of state constitutional law, where the individual right to bear arms is already well established. Forty-two states have constitutional provisions guaranteeing an individual right to bear arms and, tellingly, every state to consider the question applies a deferential reasonable regulation standard in arms rights cases. No state applies strict scrutiny or any other type of heightened review to gun laws. Since World War II, the state courts have authored hundreds of opinions using the reasonable regulation test to determine the constitutionality of all sorts of gun control laws. All but a fraction of these decisions uphold gun control laws as reasonable measures to protect public safety. If the federal courts follow this universal practice of the state courts and apply the reasonable regulation standard, nearly all gun control laws will survive judicial review. Moreover, as Professor Winkler argues, even if the federal courts decide to apply strict scrutiny, most weapons laws might still be upheld due to the overwhelming governmental interest in public safety. If so, then any eventual triumph of the individual-rights reading of the Second Amendment is likely to be more symbolic than substantive.

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INTRODUCTION

The lively debate over the Second Amendment has focused on whether it protects a right of individuals to possess arms or a collective right of states to maintain militias free from federal interference.¹ The last Supreme Court

1. For the individual-rights view, see STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (1984); JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1261–62, 1264–66 (1992); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995); and William Van Alstyne, *The Second Amendment and the Personal Right to Bear Arms*, 43 DUKE L.J. 1236 (1994).

For the collective-rights view, of which there are several variants, see H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT*

decision to address the issue was way back in 1939, when in *United States v. Miller*² the Court indicated that the Second Amendment guaranteed a collective right of states rather than an individual right.³ Much recent legal scholarship has critiqued the collective-rights view and argued that the amendment was intended to protect an individual "right to possess firearms for personal self-defense and the defense of others."⁴ Over the past few years, the individual-rights view has won over at least one federal circuit court⁵ and has become the official position of the Bush Administration's Department of Justice.⁶ It is clear that the individual-rights reading of the Second Amendment is gaining headway in American legal thought.⁷

Mostly overlooked in the literature, however, is the important question of what standard of review would apply to laws burdening the right to bear arms if the Court were to adopt the individual-rights approach.⁸ No right is absolute, and the extent to which legislation can permissibly burden a right is largely determined by the doctrinal rules, tests, and other devices the Court adopts to "implement" the right.⁹ One prominent way of implementing constitutional mandates is a standard of review, such as strict scrutiny or rational basis, which is used to judge the constitutionality of laws burdening the right. Yet in the Second Amendment literature, there has been little

FELL SILENT (2002); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309 (1998); Saul Cornell, *A New Paradigm for the Second Amendment*, 22 LAW & HIST. REV. 161 (2004); Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57, 58 (1995); and David Thomas König, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "the Right of the People to Keep and Bear Arms,"* 22 LAW & HIST. REV. 119, 154-57 (2004).

2. 307 U.S. 174 (1939).

3. *United States v. Cole*, 276 F. Supp. 2d 146, 149 (D.D.C. 2003) ("The *Miller* decision was the last time the Supreme Court considered the meaning of the Second Amendment, and for over six decades since, the lower federal courts have uniformly interpreted the decision as holding that the Amendment affords 'a collective, rather than individual, right' associated with the maintenance of a regulated militia." (quoting *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir.), cert. denied, 516 U.S. 813, 116 (1995))).

4. Calvin Massey, *Elites, Identity Politics, Guns, and the Manufacture of Legal Rights*, 73 FORDHAM L. REV. 573, 587 (2004).

5. *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001).

6. Brief for the United States in Opposition app. at 1, *Emerson v. United States*, 536 U.S. 907 (2002) (No. 01-8780), available at <http://www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.pdf> [hereinafter Ashcroft Memorandum].

7. See Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 237 (2004) (book review) ("That the individual right view prevailed definitively is evidenced by the fact that no Second Amendment scholar, no matter how inimical to gun rights, makes the 'collective right' claim any more."); Glenn Harlan Reynolds, *Gun by Gun: After Almost 100 Years of Pretending the Right to Bear Arms Didn't Mean Much, Judges and Scholars Are Changing Their Minds*, LEGAL AFF., May/June 2002, at 19.

8. See Stuart Banner, *The Second Amendment, So Far*, 117 HARV. L. REV. 898, 907-08 (2004) (book review) ("A final area that could use more attention is the plumbing. What exactly will the doctrine look like? What kinds of regulation will be unconstitutional? Which guns? Which people? Which situations? This is lawyerly detail, well below the level of most of the debate thus far, but it is detail that may be important one day.").

9. See generally Richard H. Fallon, Jr., *Implementing the Constitution*, 111 HARV. L. REV. 54 (1997) (analyzing the tools courts use to translate rights into practical doctrine).

sustained attention to what standard would be used under the individual-rights reading.

The lack of attention to Second Amendment standards is possibly due to the "assumption . . . that an individual rights approach would mean strict scrutiny . . . when courts appraise the constitutionality of gun control measures."¹⁰ In this Article, I challenge that assumption and consider the arguments for a contrary conclusion, that the Second Amendment's individual right to bear arms is appropriately governed by a deferential, reasonableness review under which nearly all gun control laws would survive judicial scrutiny.

The discussion here is informed by the example of state constitutional law, where the individual right to bear arms is already well established. Forty-two states have constitutional provisions guaranteeing an individual right to bear arms¹¹ and, tellingly, the courts of every state to consider the question apply a deferential "reasonable regulation" standard in arms rights cases.¹² No state's courts apply strict scrutiny or any other type of height-

10. Erwin Chemerinsky, *Putting the Gun Control Debate in Social Perspective*, 73 FORDHAM L. REV. 477, 484 (2004).

11. Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59, 59 n.2 (1989). Since Dowlut wrote, Wisconsin has added an individual rights provision to its constitution. WIS. CONST. art. I, § 25. Currently, six states have no right-to-bear-arms provisions: California, Iowa, Maryland, Minnesota, New Jersey, and New York. Dowlut, *supra*, at 59 n.2.

12. See, e.g., *Hoskins v. State*, 449 So. 2d 1269, 1270 (Ala. Crim. App. 1984) ("[T]he constitutional guarantee of the right of a citizen to bear arms is subject to reasonable regulation by the state under its police power, and . . . the classification created under the statute is warranted and is clearly a reasonable exercise of the State's police power."); *City of Tucson v. Rineer*, 971 P.2d 207, 213 (Ariz. Ct. App. 1998) ("[I]f it can be shown that an ordinance is directed at a legitimate legislative purpose and that the means by which the city seeks to achieve that purpose are reasonable, then the ordinance is a proper exercise of the city's police power."); *In re Wolstenholme*, 1992 Del. Super. LEXIS 341 at *18 (Del. Super. Ct. Aug. 20, 1992) ("Article I, § 7, of the Constitution of the State of Delaware do[es] not invalidate the Court's authority to impose reasonable restrictions on a license to carry a concealed deadly weapon."); *Carson v. State*, 247 S.E.2d 68, 72 (Ga. 1978) ("[T]he question in each [right-to-bear-arms] case [is] 'whether the particular regulation involved is legitimate and reasonably within the police power, or whether it is arbitrary, and, under the name of regulation, amounts to a deprivation of the constitutional right.'" (quoting *Strickland v. State*, 72 S.E. 260, 263 (Ga. 1911))); *People v. Marin*, 795 N.E.2d 953, 958 (Ill. App. Ct. 2003) ("[W]e analyze the constitutionality of the legislation at issue pursuant to the rational basis test. Under the rational basis test, a statute is upheld where it 'bears a reasonable relationship to a public interest to be served, and the means adopted are a reasonable method of accomplishing the desired objective.'" (quoting *People v. Wright*, 740 N.E.2d 755, 767 (Ill. 2000))); *Baker v. State*, 747 N.E.2d 633, 638 (Ind. Ct. App. 2001) ("[T]he law is subject to a rational basis review, and we will not invalidate it unless it draws distinctions that simply make no sense."); *Posey v. Commonwealth*, 185 S.W.3d 170, 181 (Ky. 2006) ("[W]e defer to the reasonable interpretation of our legislature, finding that the constitution permits some reasonable regulation of the people's right to bear arms, but only to the extent that such regulation is enacted to ensure the liberties of all persons by maintaining the proper and responsible exercise of the general right . . ."); *People v. Swint*, 572 N.W.2d 666, 676 (Mich. Ct. App. 1997) ("[T]he right to bear arms . . . is not absolute and is subject to . . . reasonable limitations . . ."); *James v. State*, 731 So. 2d 1135, 1137 (Miss. 1999) ("In limiting the possession of firearms by those persons who have been shown to present a threat to public safety, peace and order, the state is reasonably exercising its power to protect in the interest of the public."); *State v. White*, 253 S.W. 724, 727 (Mo. 1923) ("[T]he right to bear arms may be taken away or limited by reasonable restrictions."); *State v. Comeau*, 448 N.W.2d 595, 600 (Neb. 1989) ("We conclude that the statutes . . . are reasonable regulations of the right to keep and bear arms . . ."); *State v. Johnson*, 610 S.E.2d 739, 746 (N.C. Ct. App. 2005) ("[O]ur case law has 'consistently pointed out that the right of individuals

ened review to gun laws.¹³ Under the standard uniformly applied by the states, any law that is a “reasonable regulation” of the arms right is constitutionally permissible. Since World War II, state courts have authored hundreds of opinions using this test to determine the constitutionality of all sorts of gun control laws. All but a tiny fraction of these decisions uphold the challenged gun control laws as reasonable measures to protect public safety. If the federal courts follow suit and apply the reasonable regulation standard, nearly all gun control laws will survive judicial review—despite the construction of the Second Amendment to include an individual right. As a result, any eventual triumph of the individual-rights reading of the Second Amendment is likely to be more symbolic than substantive.

Part I of this Article examines how the standard of review question has been addressed in the two most important legal developments supporting the individual-rights construction of the Second Amendment: *United States v. Emerson*, in which a federal circuit court formally read the amendment to protect an individual right;¹⁴ and (former) Attorney General John Ashcroft’s Memorandum to United States Attorneys, which adopted the individual-rights construction as the official position of the executive branch.¹⁵ While flirting with strict scrutiny, both balk at adopting a stringent standard that might potentially interfere with ordinary gun regulation. This Part also surveys the relatively thin scholarly literature on Second Amendment

to bear arms is not absolute, but is subject to regulation.’ The only requirement is that the regulation must be reasonable and be related to the achievement of preserving public peace and safety.” (quoting *State v. Dawson*, 159 S.E.2d 1, 9 (N.C. 1968)); *Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004) (“Numerous jurisdictions have recognized that the constitutional right to keep and bear arms under a state constitution is not absolute and that reasonable regulatory control by the Legislature to promote the safety and welfare of its citizens uniformly has been upheld.”); *Masters v. State*, 653 S.W.2d 944, 946 (Tex. Ct. App. 1983) (“[A]s our State Constitution grants and guarantees a direct right to the individual, our State Constitution limits that right by implicitly mandating the Legislature to enact reasonable regulations concerning the keeping and bearing of such arms in order that the Legislature prevent disorder in our society.”); *State v. Duranleau*, 260 A.2d 383, 386 (Vt. 1969) (upholding a law when “the statutory purpose is reasonable”); *Parham v. Commonwealth*, 1996 Va. App. LEXIS 758, at *5 (Va. Ct. App. Dec. 3, 1996) (“The legislature must use means that are reasonably related to the stated purpose.”); *Rohrbaugh v. State*, 607 S.E.2d 404, 414 (W. Va. 2004) (“The restrictions contained therein are a proper exercise of the Legislature’s police power to protect the citizenry of this State and impose reasonable limitations on the right to keep and bear arms to achieve this end.”); *State v. Hopkins*, 2005 WL 2739081, at *3 (Wis. Ct. App. Oct. 25, 2005) (holding that the state constitution “also permits reasonable regulation of gun possession”); *State v. McAdams*, 714 P.2d 1236, 1238 (Wyo. 1986) (“We are cognizant of the fact that our concealed deadly weapons statute imposes some limitation on a person’s right to bear arms in defense of himself; but, when balanced against the object of the statute, we do not find the limitation unreasonable . . .”).

13. See *Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004) (“Even in jurisdictions that have declared the right to keep and bear arms to be a fundamental constitutional right, a strict scrutiny analysis has been rejected in favor of a reasonableness test . . .”); *State v. Cole*, 665 N.W.2d 328, 337 (Wis. 2003) (“If this court were to utilize a strict scrutiny standard, Wisconsin would be the only state to do so.”); see also *State v. Comeau*, 448 N.W.2d 595, 597 (Neb. 1989) (“[C]ourts have uniformly upheld the police power of the state through its legislature to impose reasonable regulatory control over the state constitutional right to bear arms in order to promote the safety and welfare of its citizens.”).

14. *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001).

15. Ashcroft Memorandum, *supra* note 6.

standards. Although some have suggested strict scrutiny, there has been no thorough analysis of whether that standard is appropriate for the arms right.

Part II begins to fill this gap and considers the arguments in support of Second Amendment strict scrutiny. Some commentators have assumed that strict scrutiny would automatically apply because the right is textually grounded in the Bill of Rights. Others have claimed that strict scrutiny would necessarily apply if the right to bear arms is deemed a "fundamental" right. Neither argument is persuasive. Most provisions in the Bill of Rights do not trigger strict scrutiny, and the oft-repeated linkage between fundamental rights and strict scrutiny is more rhetoric than doctrinal reality. Moreover, a Second Amendment right to bear arms would not fit with the underlying theoretical arguments for heightened judicial review generally. Motivated by public safety, gun control is not inherently invidious such that a presumption of unconstitutionality is warranted.

Part III examines the reasons for deferential reasonableness review of laws burdening the Second Amendment right to bear arms. The text, history, and structure of the Second Amendment all support the application of a deferential form of scrutiny. The text of the amendment recognizes that some regulation of firearms is "necessary," and the history of the right to bear arms at both the federal and state levels makes clear that the Founding generation, and those subsequent, did not generally view gun control as contrary to the existence of an arms right. Moreover, strong structural reasons counsel in favor of relatively lenient judicial review: heightened scrutiny would present significant problems of federalism, separation of powers, and institutional competence for the courts.

Part IV examines the reasonable regulation standard used in state constitutional law and considers what Second Amendment doctrine might look like under that test. Over the past sixty years, the state courts have used the reasonable regulation standard to uphold nearly all of the gun control laws that have been challenged on right-to-bear-arms grounds. Although not quite the same as the rational basis test widely used elsewhere in constitutional law, the reasonable regulation standard is equally deferential, and courts accept broad, overinclusive laws that would ordinarily be expected to fail any form of heightened scrutiny. The standard does have its limits; laws that are arbitrary or so restrictive as to "destroy" or "nullify" the right may be deemed unreasonable. Few gun control laws, however, rise to this level. Since World War II, only six published opinions in the forty-two states combined have invalidated gun control laws (or their application to particular individuals) under the state right-to-bear-arms guarantees.

Part V rounds out the discussion of Second Amendment standards of review by considering what the right-to-bear-arms doctrine might look like if the Supreme Court were to reject reasonableness review in favor of strict scrutiny or some other form of heightened review. Famously "fatal in fact," strict scrutiny could conceivably call into question a range of gun control measures. A more plausible scenario, however, is that Second Amendment strict scrutiny—or intermediate scrutiny—would still end up being lenient in

fact. Even under heightened scrutiny, most gun control laws could survive Second Amendment challenge.

The Supreme Court may well adopt the individual-rights interpretation of the Second Amendment in the near future. Yet we are just as likely to see the Court applying the same deferential scrutiny that prevails at the state level—regardless of whether the Court calls it reasonable regulation, intermediate scrutiny, or even strict scrutiny. If that prediction is correct, then the reinterpretation of the Second Amendment to protect an individual right to bear arms will have only a marginal impact on the constitutionality of gun control.

I. WHOSE STANDARD IS THIS ANYWAY?

A. Implementing Rights

Even if the Supreme Court were to read the Second Amendment to protect an individual right to bear arms, important questions of implementation would remain. The tests that govern judicial review are key factors determining the constitutional protection afforded by a right and the boundaries of governmental power to legislate in that area.¹⁶ Standards of review, such as strict scrutiny and the rational basis test, are popular methods of implementing constitutional norms, but they are not the only devices available. Courts sometimes employ a definitional approach to implementation that uses categorical rules to determine the scope of rights. For example, in freedom of speech—where standards are usually applied—the courts also use some categorical rules, such as that which holds that obscenity is beyond the scope of the First Amendment and thus unprotected.¹⁷ A law that regulates obscenity as such is not subject to any typical balancing or weighing of the interests; it is constitutional because the speech is outside of the purview of the First Amendment.

Any eventual Second Amendment right-to-bear-arms doctrine may include some definitional or categorical rules. Even assuming an individual right to bear arms, the Court could hold that some types of weapons are not “arms” covered by the amendment. Nuclear bombs, hand grenades, and anthrax-laced letters are all weapons of a sort, but it is inconceivable that the Court would hold that possession of such items is constitutionally guaranteed. Such weapons would be outside the scope of the Second Amendment, and thus a potential possessor could not make a constitutional claim against the government for denial of access to them.

While categorical rules may have a role to play in Second Amendment jurisprudence, I wish to focus in this Article on standards of review. In state constitutional law, an area in which the individual right to bear arms is already firmly established, the courts by and large use standards of review to

16. See Fallon, *supra* note 9, at 56–57.

17. *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding obscene speech to be beyond the scope of the First Amendment).

adjudicate the validity of gun control—or, I should say, they use a standard of review, the reasonable regulation test. Some state courts do occasionally use categorical rules, holding for example that felons are not included within the scope of the right.¹⁸ Yet even in these states, the usual practice is for courts to apply the reasonable regulation standard to most weapons laws.¹⁹ If the states are any indication, therefore, standards of review are likely to be a key feature of right-to-bear-arms cases.²⁰ Moreover, the two most significant legal statements of the individual-rights construction of the Second Amendment—*United States v. Emerson* and the Ashcroft Memorandum—both employed the language of standards, hinting at the potential role that this type of implementing device may play. Although neither settled on a clear standard of review to apply, together these two discussions recommend close study of Second Amendment standards of review.

B. Standards in Second Amendment Law and Literature

In 2001, the Fifth Circuit issued a landmark decision that broke from at least eighty years of federal court precedent and construed the Second Amendment to protect an individual right to bear arms. *United States v. Emerson* contained forty-three pages of historical discussion to support the individual-rights reading,²¹ but then gave only passing attention to the second-order question of the applicable standard.²² Having found an individual right to bear arms, the court, as Stuart Banner has observed, “seemed to be at something of a loss as to exactly what to do next.”²³ The court upheld the federal law challenged in that case, which banned individuals subject to a restraining order in domestic harassment cases from possessing firearms.²⁴ Here is *Emerson’s* stumbling effort to articulate the appropriate standard:

Although, as we have held, the Second Amendment *does* protect individual rights, that does not mean that those rights may never be made subject to any *limited, narrowly tailored* specific exceptions or restrictions for particular cases that are *reasonable* and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country.²⁵

18. E.g., *State v. Hirsch*, 34 P.3d 1209, 1212 (Or. Ct. App. 2001).

19. See *State v. Hirsch*, 114 P.3d 1104, 1119 n.25 (Or. 2005).

20. Cf. Banner, *supra* note 8, at 906 (“The Second [Amendment] would no doubt be interpreted analogously, with some kind of test like the ones used for the First and the Fourteenth, in which courts assess the strength of the government’s interest in regulating, the extent to which the law at issue is tailored to that interest, and so on.”).

21. *United States v. Emerson*, 270 F.3d 203, 218–60 (5th Cir. 2001).

22. *Id.* at 260–64.

23. Banner, *supra* note 8, at 908.

24. See *Emerson*, 270 F.3d at 264.

25. *Id.* at 261 (second and third emphasis added).

For the student of constitutional law, this statement confuses more than it clarifies.²⁶ On the one hand, the court invokes the highest form of judicial skepticism, the strict scrutiny standard, with its recognition of “narrowly tailored” exceptions to the right to bear arms.²⁷ The strict scrutiny test traditionally requires that laws infringing upon certain core rights be justified by a “compelling” government interest that is furthered by “narrowly tailored” means—i.e., means that are no more restrictive than necessary to achieve the government interest.²⁸ On the other hand, *Emerson* also invokes a much lower level of judicial scrutiny when it refers to the Second Amendment permitting “reasonable” restrictions on the arms right.²⁹ Traditionally, reasonableness review is a relatively deferential type of scrutiny under which most laws are upheld.³⁰

In the wake of *Emerson*, the Department of Justice, under then-Attorney General John Ashcroft, voiced its support for the Fifth Circuit’s holding that the Second Amendment guaranteed an individual right,³¹ but only added to the confusion over the appropriate standard of review. In a memorandum to all United States Attorneys and a letter to the National Rifle Association, Ashcroft officially adopted the individual-rights reading as the position of Justice but invoked the inconsistent elements of both strict scrutiny and more deferential review: “Of course, the individual rights view of the Second Amendment does not prohibit Congress from enacting laws restricting firearms ownership for *compelling state interests*, such as prohibiting firearms ownership by convicted felons”³² Here we see the famous first prong of strict scrutiny review. In the Ashcroft Memorandum, however, the Attorney General goes on to state, “the existence of this individual right does not mean that *reasonable restrictions* cannot be imposed to prevent unfit persons from possessing firearms or to restrict possession of firearms particularly suited to criminal misuse.”³³ The Ashcroft Memorandum and letter thus repeat the confusion of *Emerson*, referring simultaneously to both heightened and deferential scrutiny.

An interesting caveat in the Ashcroft Memorandum suggests the Justice Department may be leaning toward a relatively low level of judicial scrutiny. After setting forth the administration’s support for the individual-rights reading, the Ashcroft Memorandum stated that “[t]he Department [of Justice]

26. See Katherine Hunt Federle, *The Second Amendment Rights of Children*, 89 IOWA L. REV. 609, 650 (2004) (“[T]he court fails to articulate the appropriate level of scrutiny for judicial review of the legislation.”).

27. *Emerson*, 270 F.3d at 261.

28. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 416 (1997).

29. *Emerson*, 270 F.3d at 261.

30. CHEMERINSKY, *supra* note 28, at 415.

31. Ashcroft Memorandum, *supra* note 6.

32. Letter from John Ashcroft, Attorney Gen. of the U.S., to James Jay Baker, Executive Dir., Nat’l Rifle Ass’n 2 n.1 (May 17, 2001), available at <http://www.nraila.org/images/Ashcroft.pdf> (emphasis added).

33. Ashcroft Memorandum, *supra* note 6 (emphasis added).

can and will continue to defend vigorously the constitutionality, under the Second Amendment, of *all* existing federal firearms laws.”³⁴ In other words, in the Department’s view, every single federal law burdening the right to bear arms remains constitutional despite what one might have thought to be a rather radical revision of the Second Amendment’s meaning. The more things change, the more they stay the same.

Like *Emerson* and the Ashcroft Memorandum, the abundant scholarly literature on the Second Amendment has largely focused on the core meaning of the amendment and given much less attention to the standard of review question. As Erwin Chemerinsky observes, the literature commonly assumes that an individual-rights reading of the Second Amendment would occasion judicial adoption of strict scrutiny.³⁵ Roy Lucas contends that “strict scrutiny” should apply in order to “avoid leaps of illogic and unjust treatment of defendants for acts and omissions that are miles distant from criminal activity.”³⁶ Brannon Denning and Glenn Reynolds suggest that recognizing an individual right to bear arms in the Second Amendment, as they believe is necessary, would probably mean that “government regulation of [firearms] must survive strict scrutiny.”³⁷ Randy Barnett and Don Kates each write that the arms right is subject to “reasonable regulation,” but then seem to imply that they mean some form of heightened review by equating Second Amendment scrutiny with what is applied to speech restrictions under the First Amendment.³⁸ Calvin Massey has written the most sustained discussion to date of potential Second Amendment standards, and he argues for what he calls “semi-strict scrutiny.”³⁹

Not everyone supports strict scrutiny or some other form of heightened review. Chemerinsky questions the assumption of strict scrutiny and notes that some other test, such as rational basis review, could conceivably apply.⁴⁰ A few other scholars, including Laurence Tribe and Akhil Amar, also suggest in passing that reasonable regulations on the right should survive scrutiny.⁴¹ But these scholars have not sought to analyze thoroughly the standards of review question; their points about standards were only sugges-

34. *Id.* (emphasis added).

35. See Chemerinsky, *supra* note 10, at 484.

36. Roy Lucas, *From Patson v. Miller to Silveira v. Lockyer: To Keep and Bear Arms*, 26 T. JEFFERSON L. REV. 257, 329 (2004).

37. Brannon P. Denning & Glenn H. Reynolds, *Telling Miller's Tale: A Reply to David Yassky*, LAW & CONTEMP. PROBS., Winter 2002, at 120.

38. See Barnett, *supra* note 7, at 271–72; Don B. Kates, Jr., *The Second Amendment: A Dialogue*, LAW & CONTEMP. PROBS., Winter 1986, at 145–46.

39. See Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1133 (2000).

40. Chemerinsky, *supra* note 10, at 484.

41. See Laurence H. Tribe & Akhil Reed Amar, Op-Ed., *Well-Regulated Militias, and More*, N.Y. TIMES, Oct. 28, 1999, at A31 (“The right to bear arms is certainly subject to reasonable regulation in the interest of public safety.”).

The discussion below aims to fill the gap in the literature and to offer a more complete analysis of the appropriateness of strict scrutiny. In addition, this Article offers a more detailed discussion of the state constitutional law alternative—the reasonable regulation test—and considers what that might mean for the Second Amendment.

II. SCRUTINIZING THE ARGUMENTS FOR SECOND AMENDMENT STRICT SCRUTINY

What arguments could be made that strict scrutiny should apply to laws burdening the Second Amendment right to bear arms? This Part examines the arguments for Second Amendment strict scrutiny and concludes that they are not persuasive.

A. *The Bill of Rights Argument*

One argument in favor of strict scrutiny is that, as a textual provision in the original Bill of Rights, the individual right to bear arms necessarily warrants heightened review. Federal Circuit Judge Harold DeMoss, who was part of the *Emerson* majority, expressed this view in a recent dissenting opinion:

If some other statute of Congress purported to take away or restrict (1) “the right of the people peaceably to assemble and to petition the government for redress of grievances” under the First Amendment, or (2) “the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures” under the Fourth Amendment, or (3) the right of any person to be free from being “compelled in any criminal case to be a witness against himself” under the Fifth Amendment, or (4) the right of any person “to have the assistance of counsel for his defense” in any criminal case under the Sixth Amendment because, in each event, such person was “an unlawful user of or addicted to a controlled substance,” then surely this court would use the test of strict scrutiny to determine the validity of that statutory restriction.⁴²

The first (and most startling) thing to notice about Judge DeMoss’s argument is that three of the four provisions of the Bill of Rights he cites are not governed by the strict scrutiny standard at all. Although the freedom of association implicit in the right of assembly does occasionally trigger strict scrutiny protection,⁴³ the courts do not use strict scrutiny in Fourth Amendment search and seizure cases,⁴⁴ Fifth Amendment right against

42. *United States v. Herrera*, 313 F.3d 882, 889 (5th Cir. 2002) (DeMoss, J., dissenting).

43. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623–24 (1984) (applying strict scrutiny to a freedom of association claim).

44. *See, e.g., Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53, 663 (1995) (employing a reasonableness test and asserting that the Court has repeatedly declined to apply strict scrutiny in search and seizure cases).

self-incrimination cases,⁴⁵ or Sixth Amendment right to counsel cases.⁴⁶ In none of these doctrines do the courts employ a compelling interest analysis or anything resembling heightened review. Nevertheless, Judge DeMoss's argument reflects a common belief that strict scrutiny necessarily applies to the right to bear arms because the Second Amendment is located in the Bill of Rights.⁴⁷

This Second Amendment syllogism fails in its minor premise: the notion that all textually based rights in the Bill trigger strict scrutiny. This is simply incorrect as a matter of constitutional doctrine. Many, indeed most, of the Bill of Rights guarantees do not trigger strict scrutiny. Only a small number of those provisions are governed by the strict scrutiny standard: free speech, free exercise of religion, and freedom of association under the First Amendment, and substantive due process and the implicit equal protection guarantee of the Fifth Amendment. In other words, strict scrutiny is applied in cases arising from only two textual provisions of the Bill of Rights, the First and Fifth Amendments. (Strict scrutiny is also applied in cases arising from the Fourteenth Amendment, outside of the Bill.) Strict scrutiny is not applied in any doctrines arising out of the Third Amendment, the Fourth Amendment, the Sixth Amendment, the Seventh Amendment, the Eighth Amendment, the Ninth Amendment or the Tenth Amendment. From this, we might conclude that textual grounding in the Bill of Rights creates a presumption against strict scrutiny.

Nevertheless, the reason for Judge DeMoss's confusion is not hard to fathom. Constitutional lawyers have long been baptized by footnote four of *United States v. Carolene Products*, in which Justice Harlan Fiske Stone wrote that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments."⁴⁸ Law students are taught that, under footnote four, heightened review applies to the individual rights provisions of the Bill of Rights. But courts do not and have never applied strict scrutiny consistently to all of these provisions. Footnote four was a proposal that, despite wide influence in constitutional theory, has never been accepted in practice by the Supreme Court. The Court has allowed most of the Bill's provisions to be imple-

45. See, e.g., *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 189–90 (2004) (using categorical rules that require the privilege against self-incrimination to be respected whenever the testimony has a "reasonable danger of incrimination").

46. See, e.g., *Michigan v. Jackson*, 475 U.S. 625 (1986) (applying a categorical rule that any interrogation outside of the presence of counsel, after the defendant has asserted the right, is invalid).

47. See, e.g., Donald Dowd, *The Relevance of the Second Amendment to Gun Control Legislation*, 58 MONT. L. REV. 79, 111 (1997) (acknowledging this argument); Barnett, *supra* note 7, at 271–72; see also Roger I. Roots, *The Approaching Death of the Collective Right Theory of the Second Amendment*, 39 DUQ. L. REV. 71, 81 n.51 (2000) ("[A] rational basis type of review seems antithetical to any right protected under the Bill of Rights.").

48. 304 U.S. 144, 153 n.4 (1938).

mented by devices other than strict scrutiny and its presumption of unconstitutionality.⁴⁹

Moreover, even the individual rights in the Bill that do trigger strict scrutiny only receive the protection of such review some of the time. The freedom of speech, for example, is not governed exclusively by strict scrutiny; in many cases, if not most, courts apply more deferential forms of review.⁵⁰ Content-neutral regulations impinging on freedom of speech are not governed by strict scrutiny, but by *United States v. O'Brien's* relatively deferential standard, which results in challenged legislation being upheld regularly.⁵¹ Not even all content-based speech restrictions are subject to strict scrutiny. When the content is commercial speech, the courts apply the more deferential standard from *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁵² When the government regulates the content of speech, but is acting as an employer (rather than sovereign), the courts apply the relatively deferential standard from *Pickering v. Board of Education*.⁵³ Strict scrutiny only applies to a subset of speech restrictions.

The Supreme Court also applies strict scrutiny sparingly in free exercise of religion cases. The Warren Court began applying strict scrutiny in free exercise cases in 1963, with the decision in *Sherbert v. Verner*.⁵⁴ Overturning *Sherbert*, the Rehnquist Court in *Employment Division, Department of Human Resources v. Smith* held that strict scrutiny was inappropriate for generally applicable laws that burdened religious practices.⁵⁵ Such claims for exemptions make up the vast majority of free exercise claims,⁵⁶ yet the Constitution requires only rational basis review under *Smith*. Ironically, the courts in some exemption cases still apply strict scrutiny under two federal statutes, the Religious Freedom Restoration Act⁵⁷ and the Religious Land Use and Institutionalized Persons Act.⁵⁸ The irony is not that the standard survives, but that, even though it survives, few laws fail to satisfy its

49. Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, CONST. COMMENT. (forthcoming 2007), available at <http://ssrn.com/abstract=902673>.

50. See Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, U. ILL. L. REV. (forthcoming 2007), available at <http://papers.ssrn.com/abstract=887566> (detailing the pervasiveness of intermediate scrutiny in freedom of speech cases).

51. Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 2000-04 (1996) (recognizing the substantial leeway created by the intermediate scrutiny used for content-neutral laws).

52. 447 U.S. 557 (1980).

53. 391 U.S. 563 (1968).

54. 374 U.S. 398, 406 (1963).

55. 494 U.S. 872, 885 (1990).

56. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 861 (2006) (finding that, between 1990 and 2003, the federal courts ruled on fifty-eight claims for exemptions compared to fifteen claims of intentional religious discrimination).

57. 42 U.S.C. § 2000bb-1 (2000).

58. 42 U.S.C. § 2000cc-1(a) (2000).

requirements. In a recent study, I found that the federal courts applying strict scrutiny upheld generally applicable laws against claims for religion-based exemptions in seventy-four percent of cases.⁵⁹ Even where strict scrutiny applies, it can be deferential in practice.

The Fifth Amendment's Due Process Clause and implicit equal protection guarantee trigger strict scrutiny, but none of the several other individual rights guaranteed by that amendment receive the same protection. The right to property protected by the Takings Clause, for example, is governed by a diverse set of tests that include categorical rules (e.g., all permanent physical takings must be compensated),⁶⁰ deferential scrutiny (the *Penn Central* test for regulatory takings),⁶¹ and a form of intermediate scrutiny (for excessive exactions cases).⁶² One does not find strict scrutiny in the doctrines arising from the Fifth Amendment's rights against self-incrimination, to indictment by grand jury, or against double jeopardy. Despite footnote four, strict scrutiny is quite rarely applied to laws burdening the textually guaranteed rights found in the Bill of Rights.

Reasonableness review is used in one of the most important provisions of the Bill of Rights: the Fourth Amendment.⁶³ This provision, which is so central to the protection of privacy rights, does not require that invasive laws be strictly scrutinized but only that invasions be reasonable. Under Fourth Amendment reasonableness review, the Court balances the "intrusion on the individual's Fourth Amendment interests against [the] promotion of legitimate governmental interests."⁶⁴ The Court has recently been explicit that this standard does not require the most important element of heightened review: the precise fit required by the narrow tailoring, or least restrictive means, analysis.⁶⁵

Assuming that standards of review will have some role in shaping Second Amendment doctrine, one thing is clear: strict scrutiny is not automatically the applicable standard simply because the right is textually grounded in the Bill of Rights. The Supreme Court uses rational basis scrutiny, intermediate scrutiny, reasonableness review, and other tests far less demanding than strict scrutiny for individual rights found in the hallowed Bill.

B. *The Fundamental Rights Argument*

A corollary argument to the Bill-of-Rights argument is that strict scrutiny would apply because the right to bear arms is—or would be under an

59. Winkler, *supra* note 56, at 861.

60. *Lorretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

61. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

62. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

63. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995).

64. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

65. *See Acton*, 515 U.S. at 663.

individual-rights reading—a “fundamental” right.⁶⁶ Under current Second Amendment doctrine, the right protected by the Second Amendment is not deemed “fundamental.”⁶⁷ Yet one would imagine that holding would be reconsidered should the Supreme Court reinterpret the amendment to protect an individual right. Leaving to the side the question of whether the right to bear arms should be deemed a “fundamental” right, I wish to focus here on the standard of review side of the equation. Even assuming the right were, in some sense, fundamental, does strict scrutiny necessarily apply? While it is often said that fundamental rights trigger strict scrutiny, the answer is not so simple. As with the Bill-of-Rights argument, constitutional doctrine does not live up to the frequent refrain. It simply is not true that every right deemed “fundamental” triggers strict scrutiny.⁶⁸

The Supreme Court has never identified precisely what determines whether a right is “fundamental” or not. There are three potential ways to define “fundamental rights.” The first definition relies on textual placement: all rights in the Bill of the Rights might be deemed fundamental. Yet, as already noted, not all of the rights found in the Bill of Rights are protected by strict scrutiny. A second definition of fundamental rights takes its cue from the incorporation doctrine, under which only those provisions of the Bill of Rights deemed “fundamental” apply to the states.⁶⁹ Under this definition, most but not all of the rights in the Bill are fundamental; only the Second Amendment, the Third Amendment, the Fifth Amendment’s Grand Jury Clause, the Seventh Amendment’s right to trial by jury in civil cases, and the Eighth Amendment’s prohibition on excessive fines have not been incorporated.⁷⁰ Assuming the Second Amendment right to bear arms would also be incorporated to apply against the states, the right would be in this sense fundamental. Nevertheless, as we have already seen, many of the individual rights in the Bill of Rights do not trigger strict scrutiny, including many that are incorporated (such as the Takings Clause, Fourth Amendment rights, and Sixth Amendment rights). Even among those incorporated rights

66. For examples of statements to the effect that the right to bear arms would require strict scrutiny because the right is a fundamental one, see Lucas, *supra* note 36, at 328–29 (noting without argument that strict scrutiny would apply to the Second Amendment right due to its fundamental nature), and Janice Baker, Comment, *The Next Step in Second Amendment Analysis: Incorporating the Right to Bear Arms into the Fourteenth Amendment*, 28 U. DAYTON L. REV. 35, 55 (2002) (observing without extended discussion that strict scrutiny “logically follows . . . if the Supreme Court considers a right fundamental to the American scheme of justice”). See also *Arnold v. City of Cleveland*, 616 N.E.2d 163, 176 (Ohio 1993) (Hoffman, J., dissenting) (arguing for strict scrutiny because the arms right is “fundamental” under the Ohio constitution).

67. *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984) (“[T]he right to possess a gun is clearly not a fundamental right . . .”); see *Lewis v. United States*, 445 U.S. 55, 66 (1980) (suggesting the right to bear arms is not as fundamental as other rights).

68. Mathew S. Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29 N. KY. L. REV. 705, 784 (2002) (“Even what the Supreme Court describes as a fundamental right does not always merit strict scrutiny.”). Nosanchuk aptly recognizes that courts apply lower level scrutiny in the doctrines of a number of constitutional rights, including free speech and equal protection. *Id.* at 785–86.

69. See CHEMERINSKY, *supra* note 28, at 379.

70. *Id.* at 382–84.

that do prompt strict scrutiny, such as the freedom of speech and of religion, strict scrutiny is only occasionally applied.

A third definition of fundamental rights limits them to a narrower class of so-called preferred rights that are "clothed with special judicial protection."⁷¹ These rights include freedom of speech, freedom of religion, the right to vote, the right to marry, and the right to privacy.⁷² Although the Court has never made clear precisely why some individual rights are preferred over others, traditional theories emphasize that these core rights are essential to freedom and human dignity.⁷³ I will leave it to others to argue whether the right to bear arms serves these functions. In any case, assuming the right is deemed fundamental because it is a preferred right, strict scrutiny remains far from certain. Even among preferred rights, strict scrutiny is not always applied.

Strict scrutiny, for example, does not apply to fundamental, preferred rights when the courts determine that the underlying burden is only incidental. Constitutional scholars, including Michael Dorf and Alan Brownstein, have shown the pervasiveness of courts' upholding laws deemed to be incidental burdens on fundamental rights.⁷⁴ Such laws are "real infringements of rights," according to Dorf, yet the Supreme Court nevertheless tends to apply lower-level scrutiny (or none at all) absent a "substantial" burden on the rights.⁷⁵ This approach is common in speech, religion, and privacy cases.⁷⁶

Let us take the right of privacy as an illustration. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court affirmed the "central holding" of *Roe v. Wade*⁷⁷ that a woman has a privacy right to choose abortion,⁷⁸ but the joint opinion (and later a majority of the Court)⁷⁹ abandoned *Roe*'s strict scrutiny framework in favor of a more lenient "undue burden" test.⁸⁰ A woman's right to choose was not deemed to be any less fundamental; according to the joint opinion in *Casey*, "[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."⁸¹ Yet this right, so vitally important to human

71. See Henry J. Abraham, *Fundamental Rights*, in 3 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 1176, 1177 (Leonard W. Levy et al., eds., 2d ed. 2000).

72. See *id.*; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 770 (2d ed. 1988) (identifying "preferred rights").

73. See, e.g., *id.*, at 770 (arguing that the underlying interests "touch[] more deeply and permanently on human personality [and] came to be regarded as the constituents of freedom . . .").

74. See Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 *HASTINGS L.J.* 867, 893-94 (1994); Dorf, *supra* note 51, at 1180.

75. Dorf, *supra* note 51, at 1179-80.

76. See *id.* at 1199-200.

77. 410 U.S. 113 (1973).

78. 505 U.S. 833, 853 (1992) (joint opinion).

79. *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000).

80. *Casey*, 505 U.S. at 876.

81. *Id.* at 851.

dignity, did not trigger strict scrutiny, at least so long as the basic ability to choose abortion early in pregnancy was preserved. With regard to mere burdens on the right, the level of judicial protection was markedly less than strict scrutiny; so long as a law does not pose an undue burden on the right prior to viability, it will survive.⁸² While the nuances of the undue burden test remain to be seen, its leniency relative to strict scrutiny is readily apparent. The three abortion regulations upheld in *Casey*—parental notification,⁸³ informed consent,⁸⁴ and a twenty-four-hour waiting period⁸⁵—would have been invalidated under *Roe*'s strict scrutiny framework.⁸⁶ Commentators have argued that the undue burden standard is essentially a form of scrutiny akin to intermediate or rational basis review.⁸⁷

The Supreme Court has used something less than strict scrutiny for even substantial burdens on fundamental rights, at least in the context of the right of privacy. In *Lawrence v. Texas*,⁸⁸ for example, the Court invalidated Texas's criminal ban on private intimate sexual relations among persons of the same sex. While *Lawrence* never quite said the underlying right was fundamental—and the opinion was hardly a model of clarity, making strong inferences difficult to draw—the Court was straightforward in tying the underlying right to a line of cases stretching from *Griswold v. Connecticut*⁸⁹ to *Roe v. Wade*⁹⁰ that did unambiguously recognize sexual privacy rights as fundamental.⁹¹ Moreover, the Court held that the “right to liberty under the Due Process Clause gives [same-sex partners] the full right to engage in their conduct without intervention of the government,”⁹² and such substantive due process rights are usually thought of as fundamental. Nevertheless, the Court avoided the language of strict scrutiny and invoked instead what

82. *Id.* at 876.

83. *Id.* at 899–900.

84. *Id.* at 881–85.

85. *Id.* at 886–87.

86. See, e.g., *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (invalidating a parental notification requirement under *Roe*); *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) (invalidating a waiting period under *Roe*).

87. See, e.g., Deborah A. Ellis, *Protecting “Pregnant Persons”: Women’s Equality and Reproductive Freedom*, 6 SETON HALL CONST. L.J. 967, 975–76 (1996); Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2033 (1994). One reasonable reading of *Casey* is that the joint opinion’s undue burden test is not a standard of review at all but a categorical rule: if the law poses an undue burden, it is invalid, and if the law does not pose an undue burden, it survives. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). While I recognize this potential reading, the point remains that even the fundamental right to privacy is subject to something other than strict scrutiny review.

88. 539 U.S. 558 (2003).

89. 381 U.S. 479 (1965).

90. 410 U.S. 113 (1973).

91. See *Lawrence*, 539 U.S. at 564–66.

92. *Id.* at 578.

appeared to be the rational basis test,⁹³ demanding that the law be justified merely by a "legitimate state interest."⁹⁴ With nothing more than moral disapproval to justify the law, the Court ruled that even this low hurdle was not met. The only federal circuit court decision to date to consider the issue held that *Lawrence* applied rational basis review, not strict scrutiny.⁹⁵

If it was ever true that all fundamental rights elicited strict scrutiny, the Rehnquist Court in cases like *Lawrence* and *Casey* charted a different course. Even preferred rights sometimes receive little more than rational basis review. Whether the right to bear arms is fundamental in any of the three potential definitions, strict scrutiny may or may not apply. The mere fact of "fundamentality" does not answer the question of what would be the appropriate standard of review for the right to bear arms.

C. Theories of Strict Scrutiny

Rebutting the arguments that all provisions that are in the Bill of Rights or that are deemed to protect a "fundamental" right trigger strict scrutiny reveals only that strict scrutiny is not automatic. It does not indicate affirmatively whether strict scrutiny is appropriate. Perhaps the best way to answer this latter question is to consider the individual right to bear arms in light of the traditional justifications for strict scrutiny. Does the right to bear arms fit comfortably with the underlying theoretical reasons why courts apply heightened review to certain constitutional rights? Does legislation burdening the right to bear arms pose the sort of dangers that strict scrutiny is designed to protect against?

There are two main theories of strict scrutiny: an invidious motive theory and a cost-benefit theory.⁹⁶ Neither gives strong support for the application of strict scrutiny to laws burdening the right to bear arms.

1. Invidious Motive Theory of Strict Scrutiny

The invidious motive theory has its roots in the development of equal protection law by the Vinson and Warren Courts to confront the problem of race discrimination. In a series of decisions, the Court explained that heightened review was necessary for certain constitutional rights when any legislative encroachment ought to be thought of as "immediately suspect."⁹⁷

93. *Id.* at 586, 599 (Scalia, J., dissenting).

94. *Id.* at 578 (majority opinion).

95. *Lofton v. Sec'y of Dep't. of Children and Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004). This circuit court decision is not without controversy. See Mark Strasser, *Rebellion in the Eleventh Circuit: On Lawrence, Lofton, and the Best Interests of Children*, 40 TULSA L. REV. 421 (2005).

96. See Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny* 7 & n.31 (Jan. 2006) (unpublished manuscript, on file with author).

97. *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Elena Kagan has argued that First Amendment strict scrutiny also reflects a hunt for illicit motivation. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 453-54 (1996).

What made a law suspect was the likelihood that the motives underlying the legislation were “invidious”⁹⁸ or improper. As the Rehnquist Court recently explained in the context of race discrimination: “[t]he reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an invidious purpose.”⁹⁹ Strict scrutiny is thus a tool “to ‘smoke out’ ” illegitimate motives where there is special reason to believe such motives led to the challenged law.¹⁰⁰

The motive behind most gun control law is to enhance public safety, which is hardly an invidious motive. In fact, it is a perfectly legitimate goal for government. Not only is government permitted to impose restrictions on firearms to reduce violence and injury, government has a “duty” to do so.¹⁰¹ Guns are undeniably dangerous and some measure of regulation is necessary in light of the overwhelming state interest in preserving the safety and security of the public from deadly weapons.¹⁰² Individual-rights scholars agree.¹⁰³ According to Randy Barnett, “virtually all individual-rights scholars . . . hold the position that an individual right may be subject to regulation.”¹⁰⁴ According to Donald Dowd, “[a] legislature cannot be presumed to have acted unconstitutionally when it passes gun control measures for the purpose of preventing the harm that can be caused by guns.”¹⁰⁵ The underlying end of gun control, as a general matter, is not illegitimate and thus such laws are not properly considered “immediately suspect.”

To be sure, there have been and will be occasional gun control laws enacted with illegitimate motivation. In the right-to-bear-arms context, a constitutionally “illegitimate” motive might be to disarm the people completely. No doubt some gun enthusiasts fear that that proponents of gun control truly desire to make the United States more like Great Britain, where individual gun possession is traditionally illegal. Assuming an individual right, no legislature can appropriately set out to completely deny the people access to all guns. Even shielded by the justification of public safety, disarmament would eliminate a constitutional right and absent constitutional amendment would be per se illegitimate.

Even though some gun control measures may be motivated by constitutionally illegitimate objectives, this alone is not sufficient to warrant strict scrutiny’s presumption of unconstitutionality. There must also be a high

98. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

99. *Johnson v. California*, 543 U.S. 499, 505 (2005).

100. *Id.* at 506 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

101. *People v. Blue*, 544 P.2d 385, 390–91 (Colo. 1975).

102. *See State v. Cole*, 665 N.W.2d 328, 337 (Wis. 2003).

103. *See, e.g.,* Don B. Kates Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 260–62 (1983) (identifying permissible restrictions on the individual right to bear arms); Lund, *supra* note 1, at 122–23 (same); Reynolds, *supra* note 1, at 478–79 (same).

104. Barnett, *supra* note 7, at 270.

105. Dowd, *supra* note 47, at 109.

likelihood that all legislation in the area is motivated by improper motives. In *City of Cleburne v. Cleburne Living Center, Inc.*,¹⁰⁶ which held that strict scrutiny was not applicable to disability classifications, the Court explained that where some legislation in an area is “plainly . . . legitimate,” the “predicate” for “[h]eightedened scrutiny” is not present.¹⁰⁷ In the disability context, the Court found that rational basis review was applicable because “in the vast majority of situations” legislation is not invidious but “desirable.”¹⁰⁸ Moreover, legislation in the area was “a difficult and often a technical matter.”¹⁰⁹ As a result, “a certain amount of flexibility and freedom from judicial oversight”¹¹⁰ was required. The same can be said for the right to bear arms: some regulation is necessary, and achieving public safety is a difficult and technical task worthy of some legislative leeway.

Recognition of the legitimacy of gun control as a general matter does not mean that courts should have no continuing oversight role to play in right-to-bear-arms cases. The *Cleburne* Court was not ignorant of the potential for an improperly motivated disability classification; the particular law at issue in the case was invalidated for being a reflection of “mere negative attitudes.”¹¹¹ The point of *Cleburne* is that when the majority of laws can be expected to be motivated by legitimate governmental concerns lower-level scrutiny suffices to smoke out the occasional instance of illegitimate motive. Strict scrutiny is appropriately reserved for areas of law, such as race discrimination and restrictions on political speech, where we would expect most, if not all, regulation to be invidious.

Even well-meaning legislation can be constitutionally invidious if the underlying political process is operating with systemic defects—say by excluding some from participating in lawmaking.¹¹² Restrictions on the free flow of democratic self-government represent another form of improper purpose that occasion strict scrutiny’s presumption of unconstitutionality. But even with gun control widespread, gun owners are hardly a Second Amendment version of a suspect class. Gun enthusiasts are a powerful political force, represented ably at both the federal and state level by the National Rifle Association and other groups. Proponents of gun rights have succeeded in amending twelve state constitutions since 1978 to add protections for the individual right to bear arms.¹¹³ One sign of the pro-gun

106. 473 U.S. 432 (1985).

107. *Id.* at 442–43.

108. *Id.* at 444.

109. *Id.* at 443.

110. *Id.* at 445.

111. *Id.* at 448.

112. *Cf.* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting heightened review when the political process is defective). I thank Robert Goldstein for persuading me to give due attention to the process-based justification for strict scrutiny.

113. Robert A. Creamer, Note, *History Is Not Enough: Using Contemporary Justifications for the Right to Keep and Bear Arms in Interpreting the Second Amendment*, 45 B.C. L. REV. 905, 919 (2004).

movement's political power is the remarkably rapid adoption of concealed carry laws in recent years. Since 1990, twenty-nine states have passed legislation permitting the concealed carrying of firearms and a total of thirty-nine states now have such laws.¹¹⁴ In Second Amendment cases, the political process concerns that often motivate heightened review are not present.¹¹⁵

The invidiousness of restrictions on the free flow of democratic processes might have salience to the Second Amendment if that provision were read to secure the people's right to revolt against tyrannical government. Legislators might limit access to weapons to eliminate the possibility of successful revolution. Yet contemporary Second Amendment scholarship disfavors the revolution-preserving basis of the arms right, emphasizing instead individual security or self-protection.¹¹⁶ Under such a reading, the right is fundamentally about securing individuals' ability to defend themselves, their homes, and their families from violent attack. The reason for the rejection of a right of revolution is plain: armed revolt against today's military would require the possession of powerful weapons such as bombs, shoulder-launched missiles, and howitzers. Civilized society simply cannot tolerate individual possession of such weapons, and not even the most vigorous proponent of an individual right to bear arms would argue otherwise. As a result of the rejection of the right of revolution, the process-based concern for governmental entrenchment loses much of its force.

Thus, even strong proponents of an individual right to bear arms concur that some legislative regulation is legitimate, and there are no countervailing reasons to believe that all or even most gun laws should be viewed as inherently suspect. There is clearly a place for regulation of the right to bear arms, making strict scrutiny's presumption of unconstitutionality inappropriate for gun control under the invidious motive theory.

2. Cost-Benefit Theory of Strict Scrutiny

The second theory of strict scrutiny justifies heightened review as a judicial mechanism to enforce the "overarching commitment" to protect certain rights from all but the most rare and extraordinary government regulation.¹¹⁷ According to Stephen Siegel's excellent history of strict scrutiny, the standard arose as a "tool to determine whether there is a cost-benefit justification for governmental action that burdens interests for which the Constitution demands unusually high protection."¹¹⁸ Rights are not absolute

114. Mark Fritz, *Selling Guns to the Gun-Shy*, WALL ST. J., July 28, 2005, at B1.

115. Cf. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 443–44 (1985) (arguing that the political success of the disabled "belies a continuing apathy or prejudice and a corresponding need for more intrusive oversight by the judiciary").

116. E.g., Massey, *supra* note 39, at 1123 ("Almost nobody believes that the citizenry is constitutionally entitled to resist governmental tyranny by force of arms. The insurrectionist view of the arms right receives little support and we may safely discount it." (emphasis omitted)).

117. See *Denver Area Educ. Telecom. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (describing this tradition after a long list of citations to landmark speech cases).

118. Siegel, *supra* note 96, at 84.

bars on legislation, but rights can only be regulated in the most compelling and exigent circumstances.¹¹⁹ Strict scrutiny, according to Ashutosh Bhagwat, serves as “a safety valve in the event of a ‘hard case,’ where the governmental and societal reasons for infringing upon an individual right are particularly strong.”¹²⁰

The cost-benefit, or hard case, approach to heightened review originated in the Supreme Court’s free speech decisions of the mid-twentieth century.¹²¹ Free speech required unusually great protection from legislative infringement because of “its central function in the preservation of the democratic process.”¹²² The speech right is preferred because, unlike many other rights, it is essential to the smooth functioning of our representative system. When government limits speech, self-government suffers because only government-approved ideas are allowed.

One may reasonably question how central the individual right to bear arms is to the democratic process. The federal government has operated at least since the 1930s without a recognized individual right, and self-governance has not withered. In fact, we might imagine that allowing only government-approved guns helps, rather than inhibits, democracy. Whereas robust protection of free speech makes democratic dialogue uninhibited and thus serves democracy, if everyone had access to howitzers and machine guns, representative democracy would likely be harder, not easier, to achieve. As African Americans learned too well during Reconstruction, the threat of violence is an extremely effective means of keeping people from democratic participation.¹²³

Moreover, the recognized need for some degree of regulation of firearms suggests that gun control is ordinary rather than exigent. If courts allow only the rare gun control measure to survive—the so-called “hard case”—then the legislative duty to protect the public safety will be profoundly frustrated. In *Employment Division, Department of Human Resources v. Smith*,¹²⁴ Justice Scalia’s majority opinion argued that strict scrutiny was not appropriate in most free exercise cases because many burdensome laws were nevertheless necessary for the public welfare. “[I]f ‘compelling interest’ really means what it says . . . many laws will not meet the test”—a result he warned would be “courting anarchy.”¹²⁵ Such a concern for anarchy has even more force in the context of the right to bear arms, where obvious public dangers

119. See *id.* at 23.

120. Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 970 (1998).

121. See Siegel, *supra* note 96, at 16–27.

122. *Id.* at 22–23.

123. Cf. ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877, at 425–28 (1988) (describing how the Ku Klux Klan used violence to intimidate African Americans from political participation).

124. 494 U.S. 872 (1990).

125. *Id.* at 888.

would stem from a vigorous judicial oversight that undermined the legislatures' ability to regulate weapons.

D. Strict Scrutiny in the States

In light of the poor fit of the right to bear arms with the traditional theories of strict scrutiny, perhaps it should come as little surprise that courts in states with constitutional right-to-bear-arms guarantees decline to apply that standard to gun control. The question has arisen in numerous cases, but the state courts "have universally rejected using a 'strict scrutiny' test."¹²⁶

An illustration is *State v. Cole*, a 2003 decision of the Wisconsin Supreme Court.¹²⁷ The Wisconsin Constitution was amended in 1999 to include a new provision guaranteeing an individual right to bear arms, and the court was asked to apply strict scrutiny to the state's concealed carry permitting law.¹²⁸ Explaining that "relatively deferential" review was "appropriate because the interests of public safety involved here are compelling,"¹²⁹ the court held that arms regulation should not receive strict scrutiny's presumption of unconstitutionality. *Cole* continued:

We find that the state constitutional right to bear arms is fundamental. It is indeed a rare occurrence for the state constitution's Declaration of Rights to be amended. Article I, Section 25 explicitly grants a right to bear arms. Further, there is evidence in the legislative history of the amendment that it was intended to grant a "fundamental individual" right.

Nevertheless, we do not agree with *Cole*'s position that strict scrutiny or intermediate scrutiny is required in this case.¹³⁰

Note that strict scrutiny does not apply despite the court's recognition of the right to bear arms as fundamental. *Cole* and the decisions of other state courts uniformly hold that, even if the right to bear arms is a fundamental right, deferential review is appropriate for arms regulation.¹³¹ If there was any doubt about the possibility of something much less demanding than strict scrutiny applying to a right considered "fundamental," one need look only at the state courts in right-to-bear-arms cases to see it in practice.

126. Jeffrey Monks, Comment, *The End of Gun Control or Protection Against Tyranny?: The Impact of the New Wisconsin Constitutional Right to Bear Arms on State Gun Control Laws*, 2001 Wis. L. REV. 249, 290 (emphasis added).

127. 665 N.W.2d 328, 337 (Wis. 2003).

128. *Id.* at 329.

129. *Id.* at 337; see also *State v. Mendoza*, 920 P.2d 357, 367–68 (Haw. 1996) (rejecting strict scrutiny); *Arnold v. Cleveland*, 616 N.E.2d 163, 173 (Ohio 1993) (rejecting strict scrutiny because "there must be some limitation on the right to bear arms to maintain an orderly and safe society").

130. *Cole*, 665 N.W.2d at 336 (citations omitted).

131. See, e.g., *Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004) ("Even in jurisdictions that have declared the right to keep and bear arms to be a fundamental constitutional right, a strict scrutiny analysis has been rejected in favor of a reasonableness test . . ."); *Klein v. Leis*, 795 N.E.2d 633, 637 (Ohio 2003) (describing the state's power to regulate weapons possession).

III. TOWARD A REASONABLE SECOND AMENDMENT

In lieu of strict scrutiny, the state courts apply a deferential scrutiny that requires laws merely to be “reasonable regulations” on the arms right. Would a similar reasonableness standard be appropriate for the Second Amendment right to bear arms? This Part argues that some form of relatively deferential review that allows a considerable amount of legislative leeway is supported by the text of the Second Amendment and the history of the right to bear arms more generally. Moreover, structural and institutional concerns about an assertive federal judiciary in this area further counsel in favor of deference.

A. Text

The text of a constitutional provision rarely answers all of the legal questions courts are called upon to answer. Perhaps nowhere is this more the case than in the Second Amendment, as the provision’s confusing wording and grammar have for many generations clouded both the nature of the guarantee and the extent of the limits, if any, the provision imposes on government. “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”¹³²

Nevertheless, the text is the traditional starting point of any constitutional interpretation. More importantly to the question of the standard of review, the text offers a valuable insight: at least some regulation of the underlying right is explicitly envisioned. The provision specifically recognizes that the militia must be “well regulated.” The extent of that regulation is not answered by the text, but some amount of government regulation of the militia is not only acceptable but even “necessary.”

According to the individual-rights reading, the Framers understood the “Militia” to refer “to all of the people, or at least all of those treated as full citizens of the community.”¹³³ In *Emerson*, the Fifth Circuit explained that the “Militia” was not “some formal military group separate and distinct from the people at large.”¹³⁴ If the “Militia” is understood to be comprised of “the people generally,”¹³⁵ outside of an organized fighting force, then the Second Amendment would seem to permit at least some measure of legislation affecting the arms bearing of these ordinary individuals. They comprise the militia and, as a result, are themselves subject to being “well regulated.” Indeed, there is no other way to regulate an unorganized militia comprised

132. U.S. CONST. amend. II.

133. Levinson, *supra* note 1, at 646–47; see also Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1155 (1996); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1164 (1991).

134. *United States v. Emerson*, 270 F.3d 203, 235 (5th Cir. 2001).

135. *Id.*

of the people at large than to adopt rules and requirements targeted at individual ownership and possession.

What does the Second Amendment mean by its reference to “well regulated”? Under a broad interpretation, the reference might be taken to recognize a great deal of governmental authority to preserve public safety. Several leading individual-rights scholars, by contrast, have argued for a narrow reading according to which the Framers meant to allow only training and discipline. According to this reading, a “well regulated militia” was to the Framers “one that was well-trained and equipped; not one that was ‘well-regulated’ in the modern sense of being subjected to numerous government prohibitions and restrictions.”¹³⁶ Regardless of which view of regulation is the correct one, even under the narrow reading there is some legitimate space for government to adopt laws to enhance safe gun possession. Training and discipline does not simply happen; laws must be adopted to ensure that the people are properly educated about guns and that the people understand the rules governing the use of guns. Discipline implies control, and the state disciplines individual gun users by teaching them the rules and by punishing them for failure to obey. No doubt there is a limit to governmental authority: “well regulated” should also be understood as a limitation on governmental power. According to Nelson Lund, the text envisions a militia that is not “overly regulated or inappropriately regulated.”¹³⁷ By the same token, however, a “well regulated militia” is also one that is not under-regulated. Some measure of regulatory authority, even though its precise contours are unclear, does seem to be called for by the text.

Contrast the Second Amendment’s nod to governmental authority with the language of the neighboring First Amendment, where heightened scrutiny occasionally applies. Proponents of an individual right to bear arms often call for the Second Amendment to be interpreted in the same manner as the First Amendment.¹³⁸ For purposes of evaluating an appropriate standard for judicial review of legislation, the textual difference between the two could not be starker. The First Amendment states “Congress shall make no law”¹³⁹ abridging the individual rights it guarantees, whereas the Second describes the “necessity” of a “well regulated Militia.” One provision suggests the invalidity of any legislation; the other invites regulation.

A relatively broad reading of the governmental power to organize, train, and discipline the militia might also be appropriate in light of the public safety point made earlier: government regulation of guns in modern society is truly “necessary.” No mainstream scholar of the Second Amendment denies that government must have the authority to adopt legislation prohibiting a variety of weapons (such as machine guns), requiring education and training, and restricting access to guns by irresponsible bearers (such as minors

136. Reynolds, *supra* note 1, at 474; see also Barnett & Kates, *supra* note 133, at 1209.

137. Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL. 157, 175 (1999) (emphasis omitted).

138. See, e.g., Barnett, *supra* note 7, at 271.

139. U.S. CONST. amend. I (emphasis added).

and dangerous criminals). There is bound to be disagreement about the precise extent of governmental authority; determining the correct line is not my goal here. It is enough for my purposes that there is a baseline agreement that some regulation is perfectly legitimate. For a court choosing a standard of review, then, a heightened standard that presumes every regulation to be unconstitutional makes no sense.

Again, the state experience is instructive. My colleague Eugene Volokh has shown the importance of looking to the state right-to-bear-arms provisions in trying to understand the Second Amendment.¹⁴⁰ Like the Second Amendment, several of the state constitutions with individual rights guarantees also explicitly recognize in the text a degree of regulatory authority. Florida's constitution reads, "[t]he right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law."¹⁴¹ Georgia's constitution provides that "the General Assembly shall have the power to prescribe the manner in which arms may be borne."¹⁴² Prior to 1978, Idaho's right-to-bear-arms provision not only recognized regulation as legitimate, but commanded government to undertake it: "the legislature *shall regulate* the exercise of this right by law."¹⁴³ But such language is hardly a condition for deferential review of gun control. The majority of state individual-rights provisions contain no such language, yet the courts still apply the same reasonable regulation standard.

The text of the Second Amendment recognizes a measure of governmental authority to regulate those who possess arms. In choosing a standard of review to apply to gun control, the federal courts should look for a way to protect the basic right to bear arms, while at the same time respecting the text's call for legislative room to regulate guns. The Second Amendment's nod to the propriety of some regulation suggests that courts should avoid adopting a presumption of invalidity that might threaten or unduly discourage such legislative activity.

B. History

Any effort to give meaning to the Second Amendment must account for the historical development of the right to bear arms and its place in American governance. For centuries, even before the Revolution, the law has

140. E.g., Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793 (1998); see also David B. Kopel, *What State Constitutions Teach About the Second Amendment*, 29 N. KY. L. REV. 827, 827 (2002) ("It is well-settled that state constitutions can serve as an aid to interpreting the federal Bill of Rights. Regarding the Second Amendment, state constitutions are especially helpful.").

141. FLA. CONST. art. I, § 8(a).

142. GA. CONST. art. I, § 1, ¶ VIII.

143. IDAHO CONST. art. I, § 11 (amended 1978) (emphasis added). Other states with similar language include Illinois, ILL. CONST. art. 1, § 22 ("Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed."), and Utah, UTAH CONST. art. I, § 6 (1984) ("[N]othing herein shall prevent the legislature from defining the lawful use of arms.").

regulated gun ownership and use. Although the terminology of “gun control” is modern, the practice of arms regulation extends back deep into Anglo-American law.

The right to bear arms with which our Founders were familiar was one that had always been subject to regulation. English law dating back to the twelfth century restricted where and when arms could be borne. The Statute of Northampton, adopted in 1328, declared that “no Man great nor small” was permitted “to come before the King’s Justices, or other of the King’s Ministers . . . with Force and Arms,” or to “ride armed by Night nor by Day, in Fairs, Markets.”¹⁴⁴ The 1689 English Bill of Rights provided that “Subjects which are Protestants may have Armes for their defence Suitable to their Condition and as allowed by Law.”¹⁴⁵ The mention of suitability and the allowance only of specific religious adherents to possess arms indicate that the right was not considered absolute or immune to government oversight. Blackstone’s *Commentaries on the Law of England*, written in 1765, also noted that the people enjoyed a right to bear arms “suitable to their condition and degree, and such as are allowed by law,” adding that the right was subject to “due restrictions.”¹⁴⁶

According to historians Saul Cornell and Nathan DeDino, who have researched gun control in early America, “a variety of gun regulations were on the books when individual states adopted their arms-bearing provisions and when the Second Amendment was adopted.”¹⁴⁷ Among the most intrusive form of arms regulations existing at the time of the Founding were militia laws.¹⁴⁸ These state laws required the government to keep detailed records of which individuals possessed arms,¹⁴⁹ not unlike modern registration laws. The militia laws also recognized the government’s authority to require gun owners to report for a “muster”—a gathering in which arms would be inspected or the men trained—under penalty of fines.¹⁵⁰ Some states also required gun owners to take loyalty oaths, upon which the right to possess firearms was contingent.¹⁵¹ According to a 1778 Pennsylvania law, any

144. Statute of Northampton, 2 Edw. 3, c. 3 (1328).

145. 1 W. & M., 2d sess., c. 2, § 7 (1689).

146. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 139 (Univ. of Chicago Press, 1979) (1765).

147. Saul Cornell & Nathan DeDino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 502 (2004). See generally SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2006) (documenting early efforts to regulate guns).

148. *Id.* at 505. For examples of state laws regulating the militia, see Act of May 8, 1792, 1792 Conn. Pub. Acts 423; Act of July 19, 1775, ch. 1, 1776 Mass. Acts 15; Act of Apr. 3, 1778, ch. 33, 1778 N.Y. Laws 62; Act of Mar. 20, 1780, ch. 167, 1780 Pa. Laws 347; and Act of Mar. 26, 1784, 1784 S.C. Acts 68.

149. Cornell & DeDino, *supra* note 147, at 505; see, e.g., § 9, 1776 Mass. Acts at 18 (requiring “an exact List of [each man in the] Company, and of each Man’s Equipments”).

150. See, e.g., § 9, 1776 Mass. Acts at 18; 1778 N.Y. Laws at 66; 1784 S.C. Acts at 68.

151. See, e.g., Act of Mar. 14, 1776, ch. 7, 1776 Mass. Acts 31; Act of Apr. 1, 1778, ch. 61, § 5, 1778 Pa. Laws 123, 126.

person to "refuse or neglect to take the oath or affirmation" of loyalty to the state was required to turn in his arms and barred from keeping any firearms or ammunition in his "house or elsewhere."¹⁵² At the time of the Founding, states also regulated the storage of gunpowder and imposed limits on the amount of ammunition a person could keep in his home.¹⁵³ A Massachusetts law from 1783 barred the inhabitants of Boston from keeping loaded arms in "any Dwelling House, Stable, Barn, Out-house, Ware-house, Store, Shop, or other Building."¹⁵⁴

"In the years after the adoption of the Second Amendment," Cornell and DeDino observe, "the individual states adopted even more stringent types of regulations [T]he decades after ratification . . . saw increased, not decreased, levels of regulation."¹⁵⁵ In the early nineteenth century, several states sought to preserve public safety by prohibiting or restricting the carrying of concealed weapons.¹⁵⁶ Georgia and Tennessee criminalized the sale of certain weapons that were easily concealed.¹⁵⁷ Other regulations on weapons from this period include licensing laws, restrictions on where firearms could be discharged, and compulsory militia musters.¹⁵⁸ "If one simply looks at the gun laws adopted in the Founding Era and early Republic," Cornell and DeDino argue, "the evidence for robust regulation is extensive."¹⁵⁹ Certainly it would be a stretch to claim that the founding generation believed that all weapons laws were inherently suspect and presumptively unconstitutional.

The history of the Second Amendment in particular provides little support for heightened scrutiny. During its first century, the amendment was (like many others) moribund in the courts. In the nineteenth century, the Supreme Court did not invalidate any laws on the basis of the Second Amendment, and the only significant relevant cases held that the amendment was not incorporated to apply against the states.¹⁶⁰ Over the last century, the Second Amendment has been read as lacking an individual right to bear arms and the federal courts have upheld scores of laws against Second Amendment challenge. Indeed, the federal courts have never used the Second Amendment to strike down a regulation of firearms. Even if one is

152. § 5, 1778 Pa. Laws at 126; see Cornell & DeDino, *supra* note 147, at 506.

153. *E.g.*, Act of June 26, 1792, ch. 10, 1792 Mass. Acts 208 (addressing the carting and transporting of gunpowder in Boston); Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 627 (concerning the storage of gunpowder); Act of Dec. 6, 1783, ch. 104, 2 Pa. Laws 256; see also Cornell & DeDino, *supra* note 147, at 510–11.

154. Act of Mar. 1, 1783, ch. 13, 1783 Mass. Acts 218.

155. Cornell & DeDino, *supra* note 147, at 502–505.

156. *E.g.*, Act of Mar. 18, 1859, 1859 Ohio Laws 56 (prohibiting the carrying of concealed weapons); Act of Feb. 2, 1838, ch. 101, 1838 Va. Acts at 76 (same); Act of Oct. 19, 1821, ch. 13, 1821 Tenn. Pub. Acts 15 (same); see also Cornell & DeDino, *supra* note 147, at 513.

157. See Act of Dec. 25, 1837, 1837 Ga. Laws 90; Act of Jan. 27, 1838, ch. 137, 1838 Tenn. Pub. Acts 200.

158. Cornell & DeDino, *supra* note 147, at 505, 515–16.

159. *Id.* at 505.

160. *United States v. Cruickshank*, 92 U.S. 542, 542 (1875) (holding that the Second Amendment did not apply to the states).

inclined to discount at least some of this history due to the prevailing collective-rights view of the Second Amendment, the fact remains that the history of the Second Amendment is more consistent with deferential judicial review than with skeptical scrutiny.

The history of the right to bear arms has also played out at the state level. For purposes of standards of review, the most important chapters in this story are those dealing with legal regulation and the limits imposed by judicial review. As noted, forty-two states currently have constitutional provisions guaranteeing an individual right to bear arms.¹⁶¹ These states also have long histories of gun control, which the state courts have overwhelmingly found to be perfectly consistent with the existence of this individual right. This level of uniformity is itself telling, given the variety of cultures and ideologies among the states with such constitutional guarantees. The state practice of deferential scrutiny is considered more thoroughly below in Part IV. At this point, it suffices to recognize that the state constitutional doctrine on the right to bear arms is well developed and remarkably consistent across states. The state practice of judicial deference is uniform and the “reasonable regulation” standard has been applied to a vast array of different types of gun control, almost all of which have been upheld.

For many state constitutions, the relevant “framing” period is not the 1780s, when the federal Constitution was formed, but later eras in which state constitutions were revised and amended. But regardless of which historical period the courts look to in defining the meaning of their state’s constitutional provisions, the result—deferential review—is the same. In *Klein v. Leis*,¹⁶² an Ohio decision upholding a law barring concealed carry, the court looked to history to inform the choice of standard for arms regulation. “Ohioans of the late nineteenth century,” *Klein* explained, considered the right to bear arms to be “limited.”¹⁶³ As a result, a relatively deferential reasonableness test, rather than heightened scrutiny, captured the appropriate scope of the right. Courts interpreting even newer state constitutional provisions also reject heightened review in favor of the reasonable regulation standard. In Nebraska, for example, where the state amended its constitution to add an individual right to bear arms in 1988, the courts nevertheless rejected heightened review in a case decided the following year.¹⁶⁴

Whether interpreting a new constitutional provision or one from the founding era, the state courts have consistently chosen to apply relatively light judicial scrutiny to gun control. In the modern era of constitutional law—roughly since World War II—the states have come together in a rare illustration of widespread consensus on what might otherwise be a controversial, hot-button issue. No state court applies heightened scrutiny and only

161. For a very useful website providing a comprehensive listing of the state constitutional provisions, see Eugene Volokh, *State Constitutional Right to Keep and Bear Arms Provisions*, <http://www.law.ucla.edu/volokh/beararms/statecon.htm> (last visited Aug. 24, 2006).

162. 795 N.E.2d 633, 636 (Ohio 2003).

163. *Id.* at 637.

164. *State v. Comeau*, 448 N.W.2d 595, 598 (Neb. 1989).

a handful of state courts have invalidated any sort of gun law over the past sixty years for violating the right to bear arms. The state legal history of the right to bear arms unquestionably recognizes a right belonging to individuals, but one subject to regulation without vigorous judicial oversight. In other areas of law, constitutional thinkers have reminded us that established governmental traditions are to be respected in judicial interpretation.¹⁶⁵ In the context of the right to bear arms, such respect translates into adherence to the tradition of judicial refusal to interfere with legislation imposing limits on guns.

C. Structure

Structural concerns also counsel against the adoption of any form of heightened scrutiny under the Second Amendment that significantly cuts back legislative authority to control guns. Vigorous judicial review of gun regulation presents serious problems of federalism, separation of powers, and institutional competence.

A decision by the Supreme Court to apply a truly strict scrutiny to gun control would substantially disrupt settled state law. All of the states currently use a reasonableness test, under which the courts have upheld any number of different types of gun control. If the Second Amendment promised a stricter form of review, the existing precedents would be rendered useless. Future gun litigation would not raise state constitutional right-to-bear-arms claims when a claim under the federal Constitution offered a more protective standard (and hence a better chance of victory). Second Amendment strict scrutiny would completely displace existing state law with a single national standard. While federal supremacy at times requires such displacement (consider *Brown v. Board of Education*'s antidiscrimination principle¹⁶⁶), extreme caution is necessary when, as in the case of the right to bear arms, the Court would undo in one fell swoop decades of consistent, uniform case law from dozens of jurisdictions in the name of establishing a federal right already recognized at the state level.

The states are often thought of as "laboratories of democracy," meaning that at times they should be afforded sufficient space to experiment with various solutions to social problems without national governmental supervision.¹⁶⁷ Due to the collective-rights interpretation of the Second Amendment, the federal courts have remained on the sidelines of experimentation and debate over the constitutionally permissible scope of gun control. The vast majority of states used that leeway to experiment with the right to bear arms.

165. *E.g.*, *McCreary County v. ACLU*, 124 S. Ct. 2722, 2752–53 (2005) (Scalia, J., dissenting) (arguing that established governmental practices of acknowledging God should inform construction of the Establishment Clause).

166. 349 U.S. 294, 299 (1955).

167. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

The unusual thing, from the perspective of democratic experimentalism, is that forty-two states have found themselves in the same place: a constitutional right to bear arms governed by deferential scrutiny. Just as the Supreme Court prefers to wait to rule on an issue until there is a split in the circuits, so too would the Court be well advised not to upset a broad state law consensus such as one finds with the right to bear arms. A single national standard of strict scrutiny would mean that the states would no longer be free, as they are now or would be under a Second Amendment reasonableness review, to experiment with different levels of scrutiny and to seek for themselves the balance between safety and weapons.

In addition to the risk of federal overreaching, a Supreme Court decision adopting strict scrutiny would raise separation of powers concerns. Strict scrutiny would not just disrupt settled state law, it would also call into question a range of federal gun control laws. Congress has been regulating firearms for over seventy years,¹⁶⁸ and a skeptical and rigorous form of judicial scrutiny would threaten existing federal gun control. Recall that the Ashcroft Memorandum made plain the Justice Department's view that, even under an individual-rights construction of the Second Amendment, "all" federal gun control laws remained constitutional.¹⁶⁹ If the Court were to apply a standard with real bite and invalidate many of those laws, the longstanding tradition of congressional authority to regulate weapons would be significantly curtailed.

Profound questions of institutional competence also would attach to a Supreme Court decision to apply heightened review. In his famous article on "underenforced constitutional norms," Larry Sager observed that courts often refuse to give full judicial protection to constitutional rights when judges feel themselves unable "to prescribe workable standards of state conduct and devise measures to enforce them."¹⁷⁰ At the state level, the right to bear arms is relatively underenforced by the judiciary, and a Second Amendment right to bear arms would be a good candidate for similar treatment.¹⁷¹ For one, the questions of gun policy are complex and the adverse consequences of judicial error are unusually great. The debates over the effectiveness of various forms of gun control are dense, and the empirical data often conflicting, leaving courts understandably reluctant to engage with them. Consider the influential study of economist John Lott, Jr., who found that

168. The National Firearms Act of 1934 has been called "the first federal gun control law." David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 662 (2000). That federal law is currently codified at 26 U.S.C. §§ 5801–5872 (2000).

169. Ashcroft Memorandum, *supra* note 6.

170. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1217 (1978).

171. Brannon Denning has argued that the Second Amendment right to bear arms is just this sort of underenforced right under current doctrine. See Brannon P. Denning, *Gun Shy: The Second Amendment as an "Underenforced Constitutional Norm,"* 21 HARV. J.L. & PUB. POL'Y 719 (1998). Contrary to my argument, Denning's article argues for far more vigorous judicial enforcement of the right.

concealed carry laws had a strong deterrent effect on crime.¹⁷² Lott's sophisticated regression analyses were rebutted by resounding criticism of his methodology, and a wave of scholarship has challenged his analysis and conclusions.¹⁷³ Judges do not want, and are not especially competent, to sort out such disputes and settle intensely debated issues of social science. Granted, judges have stepped into other hotly contested, empirically debatable areas of law. But the consequences of erroneous judicial invalidation with regard to gun legislation are particularly undesirable. As one commentator notes, "[i]f courts demand that legislators narrow gun regulations as narrowly as possible, they could be risking lives in the process."¹⁷⁴

Traditionally, when courts perceive that an erroneous judicial decision would pose substantial risks to public safety and security, they tend to adopt a stance of deference rather than skepticism. An example is deference to prison officials when they adopt regulations burdening inmates' rights in the interest of prison safety. In most instances, the courts apply the deferential standard of *Turner v. Safley*, which requires only that prison policies be "reasonably related to legitimate penological objectives."¹⁷⁵ As the Supreme Court explained in that decision, "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."¹⁷⁶ Substitute "legislators" for "prison officials" and "gun safety" for "prison administration," and the logic of *Turner's* deference retains its persuasive force. Weapons require some degree of regulation, but the problems of gun violence and crime have proven enormously difficult to solve even with legislative flexibility and room to experiment. Second Amendment heightened review, if applied aggressively, could make finding those solutions even more difficult.

Key to judicial deference in this area is the recognition that gun control reflects a delicate balance between individuals' ability to protect themselves and the larger collective protection that people seek from government. An uninhibited right to bear arms without legislative limitations returns society to the state of nature, in which each person fends for herself. Hobbes famously argued that it was precisely the dangers of such an environment that required people to form governments and laws in the first place.¹⁷⁷ One chief

172. JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS* (1998).

173. E.g., Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193 (2003); Mark Duggan, *More Guns, More Crime*, 109 J. POL. ECON. 1086 (2001); Jens Ludwig, *Concealed-Gun-Carrying Laws and Violent Crime: Evidence from State Panel Data*, 18 INT'L REV. L. & ECON. 239 (1998).

174. Monks, *supra* note 126, at 264 n.94.

175. 482 U.S. 78, 99 (1987).

176. *Id.* at 89.

177. THOMAS HOBBS, *LEVIATHAN* 89 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651).

role of government, therefore, is to provide a collective measure of protection for all from violence and the threat of personal harm. Protection from injury by guns and criminals using guns is part of this governmental obligation. An individual right to bear arms means that government cannot achieve this goal through straightforward disarmament, but must instead balance the individual's ability to defend herself against the collective need to protect all others. Achievement of that balance requires highly complex socio-economic calculations regarding what kinds of weapons ought to be possessed by individuals and how to limit access to them by those deemed untrustworthy or dangerous. Such complicated multi-factor judgments require trade-offs that courts are not institutionally equipped to make. Legislatures, by contrast, are structured to make precisely those kinds of determinations.

The structural dilemma posed by the sudden establishment of a federal rule of heightened scrutiny is only exacerbated by the fact that the Supreme Court would be a newcomer to the individual-right-to-bear-arms field, which is already heavily populated by experienced state legislatures, state judiciaries, and the Congress. Most of the key issues in gun regulation have been the subject of state court rulings, often by numerous states all ruling the exact same way. For decades, and in some instances centuries, state lawmakers have been balancing the individual right to bear arms with the public safety concerns necessitating regulation. A "green" Court should not lightly disregard this wealth of experience.

For institutional reasons, courts wisely tend to follow the path of other jurisdictions that have confronted the same issue, especially when there is widespread agreement. Indeed, state courts commonly cite the rejection of strict scrutiny by other state courts to justify their own decision to apply reasonableness review.¹⁷⁸ As the Wisconsin Supreme Court explained in the *Cole* decision, "[w]e find the precedents of other states, favoring a 'reasonable' test, to be persuasive in the context of the right to bear arms."¹⁷⁹ The Colorado Supreme Court observed that deferential review of weapons laws was "in accordance with the vast majority of cases construing state constitutional provisions."¹⁸⁰ The state court tradition of deference is itself partially a function of institutional competence concerns; all courts, from state to Supreme, are properly hesitant to presume the unconstitutionality of laws in an area where there is a conceded need for governmental regulation and where no other courts apply heightened scrutiny.

IV. THE PRACTICE OF REASON

While the analysis of text, history, and structure offered above pointed in the direction of a relatively deferential scrutiny, it did not suggest any more

178. See, e.g., *State v. Mendoza*, 920 P.2d 357, 367–68 (Haw. 1996); *Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004).

179. *State v. Cole*, 665 N.W.2d 328, 336 (Wis. 2003).

180. *Robertson v. City of Denver*, 874 P.2d 325, 329 (Colo. 1994).

precise contours of the appropriate standard. For that, the place to look is where the case law is rich with controversies dealing with the exact question: state constitutional law on the right to bear arms.¹⁸¹ The states have applied a reasonable regulation test to a wide array of gun control measures, with surprisingly little variation in reasoning or results. Oliver Wendell Holmes famously taught that “[t]he life of the law has not been logic: it has been experience.”¹⁸² The American constitutional experience with the individual right to bear arms has taken place primarily in the states. If one wants to imagine what Second Amendment scrutiny will look like under an individual-rights reading, state constitutional law is the place to begin.

A. *The Reasonable Regulation Standard*

The state constitutional practice of applying deferential review in right-to-bear-arms cases extends back well over a century. In the late nineteenth century, state supreme courts began asking whether gun safety regulations were “reasonable.” In *State v. Shelby*,¹⁸³ the Missouri Supreme Court upheld a prohibition on possession of firearms by intoxicated individuals against a challenge under the state’s constitution. While explaining that the state constitution “secures to the citizen the right to bear arms in the defense of his home, person, and property,” the court argued that the “statute is designed to promote personal security, and to check and put down lawlessness, and is thus in perfect harmony with the constitution.”¹⁸⁴ “[W]e are of the opinion the act is but a *reasonable regulation* of the use of . . . arms, and to which the citizen must yield,” the court concluded.¹⁸⁵ In the decades since, the reasonable regulation test has spread throughout the states with constitutional provisions guaranteeing an individual right to bear arms.

The reasonable regulation test “should not be mistaken for a rational basis test,”¹⁸⁶ such as that found in Equal Protection cases.¹⁸⁷ Under rational basis review, the question is whether the law is a rational means of furthering legitimate governmental ends. The court applying rational basis review does not formally consider the extent of the burden on the individual; what

181. David Kopel, one of the leading experts on the Second Amendment, has written several excellent articles examining the state constitutional provisions guaranteeing a right to bear arms. See Kopel, *supra* note 140; David B. Kopel et al., *A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts*, 68 TEMP. L. REV. 1177 (1995) [hereinafter Kopel et al., *Three Cities*]. Kopel uses the state experience to support an individual-rights interpretation of the Second Amendment, but does not discuss in depth how the reasonableness standard used at the state level might work in the context of the Second Amendment. My discussion here fills this gap.

182. OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881).

183. 2 S.W. 468 (Mo. 1886).

184. *Id.* at 469.

185. *Id.* (emphasis added).

186. *State v. Cole*, 665 N.W.2d 328, 338 (Wis. 2003).

187. See David B. Kopel, *The Licensing of Concealed Handguns for Lawful Protection: Support from Five State Supreme Courts*, 68 ALB. L. REV. 305, 315–16 (2005) (distinguishing reasonable regulation and rational basis tests).

matters is whether there are reasonable objectives served by the law. "The explicit grant of a fundamental right to bear arms," courts insist, "clearly requires something more, because the right must not be allowed to become illusory."¹⁸⁸

Under the reasonable regulation test applied to gun control, the question is whether the challenged law is a reasonable method of regulating the right to bear arms. Even a law backed by legitimate governmental ends, though, can burden the right too much and be unconstitutional under the reasonable regulation test. If a state attempted to disarm its citizenry completely, such a law might well survive rational basis review, assuming the goal is public safety and that a rational legislator could conclude that banning all firearms furthers public safety. Under a reasonable regulation standard, however, a complete ban on firearms would effectively do away with the underlying right, and, as a result, such a law could not be a reasonable regulation *of the right*. The law might be a reasonable regulation of the polity or of society, but not of the right. Ordinary forms of gun control such as licensing laws, bans on concealed carry, and prohibitions on particular types of weapons are, by contrast, attempts to regulate the right rather than eliminate it and are routinely upheld. So long as a gun control measure is "not a *total ban* on the right to bear arms,"¹⁸⁹ the courts will consider it a mere regulation of the right.¹⁹⁰

The language used in state court opinions to describe the limits of reasonableness embodies the unique focus of the test used in right-to-bear-arms cases. State courts explain that the difference between reasonable and unreasonable regulation of the arms right is that any law that "eviscerates,"¹⁹¹ renders "nugatory,"¹⁹² or results in the effective "destruction"¹⁹³ of the right is unreasonable. A law that so excessively burdens the right as to destroy it will be invalidated. In this way, the reasonable regulation standard adopts a categorical rule: destruction of the right, such as by disarmament, is *per se* unconstitutional. In some decisions, the state courts also hold a gun law (or its application) to be unreasonable where the law is arbitrary or irrational.

Short of nullifying the right to bear arms or being arbitrary, gun control laws consistently survive the reasonableness test. Courts applying the reasonable regulation standard go through the formal motions of identifying the underlying governmental objectives and weighing those goals against the burden on the individual. "[T]he reasonableness test focuses on the balance of the interests at stake,"¹⁹⁴ one court notes. But this balancing is decidedly

188. *Cole*, 665 N.W.2d at 338.

189. *Mosby v. Devine*, 851 A.2d 1031, 1045 (R.I. 2004) (emphasis added).

190. *See People v. Williams*, 377 N.E.2d 285, 286–87 (Ill. App. Ct. 1978).

191. *State v. Hamdan*, 665 N.W.2d 785, 799 (Wis. 2003).

192. *Trinen v. City of Denver*, 53 P.3d 754, 757 (Colo. Ct. App. 2002).

193. *State v. Dawson*, 159 S.E.2d 1, 11 (N.C. 1968); *State v. McAdams*, 714 P.2d 1236, 1237 (Wyo. 1986); *see also State v. Comeau*, 448 N.W.2d 595, 598 (Neb. 1989).

194. *State v. Cole*, 665 N.W.2d 328, 338 (Wis. 2003).

tipped in favor of the government, so much so that the individual almost never wins. The large-scale problem of violence in society, which includes (but is not limited to) gun violence, virtually always overwhelms the individual challenger's interest in self-defense or recreation. The burden on the individual is usually considered to be minimal so long as there are alternative means of exercising the right. According to the Ohio Supreme Court, "any [gun control measure] imposes a restraint or burden upon the individual, but the interest of the governmental unit is, on balance, manifestly paramount."¹⁹⁵

There has been no comprehensive empirical study of state right-to-bear-arms cases, but the consensus in the academic literature is that approximately twenty laws have been invalidated for violating this state constitutional right.¹⁹⁶ But that number is somewhat deceptive; the majority of these decisions are from the nineteenth century, predating the rise of modern constitutionalism. Since World War II, the published opinions of the state courts¹⁹⁷ include nine decisions invalidating laws (or the application of laws to specific individuals) on the basis of the right to bear arms. Of those nine, six were gun control laws. This is but a fraction of the hundreds, if not thousands, of gun control laws enacted at the state level during this period. Under the reasonable regulation standard, courts uphold all but the most arbitrary and excessive laws. In thirty-six of the forty-two states with individual right-to-bear-arms guarantees, no gun control measure has been invalidated in over half a century under those provisions.

While there is a difference in focus between reasonable regulation and rational basis, in ordinary practice both standards are extremely deferential.¹⁹⁸ Rational basis review has been characterized as "virtually none in fact" because nearly every law subject to it survives judicial scrutiny.¹⁹⁹ Similarly, nearly all laws survive the reasonable regulation standard, thus giving wide latitude to legislatures. As the Illinois Supreme Court noted, the

195. *Mosher v. City of Dayton*, 358 N.E.2d 540, 543 (Ohio 1976).

196. See Todd Barnett, *Gun "Control" Laws Violate the Second Amendment, and May Lead to Higher Crime Rates*, 63 MO. L. REV. 155, 188 n.173 (1998); Kopel et al., *Three Cities*, *supra* note 181, at 1180 n.12 (1995).

197. My research was limited to published opinions, which may undercount the actual number of cases invalidating gun laws. It is possible that some courts have invalidated laws without publishing opinions, but these cases are hard to uncover. In any event, one supposes that the vast majority of decisions invalidating state laws would be published, meaning that any undercount resulting from relying on published opinions alone would not be great. Nevertheless, one must recognize the possibility that other cases exist.

198. State courts commonly use the rational basis and reasonable regulation language interchangeably. See, e.g., *Robertson v. City of Denver*, 874 P.2d 325, 331 (Colo. 1994) (requiring the law to be "reasonably related to a legitimate governmental interest such as the public health, safety, or welfare"); *Trinen v. City of Denver*, 53 P.3d 754, 757 (Colo. Ct. App. 2002) (referring to the "rational basis test"); *City of Chicago v. Taylor*, 774 N.E.2d 22, 29 (Ill. App. Ct. 2002) (requiring the law to be "rationally related to a legitimate governmental interest").

199. Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

right to bear arms is subject to "substantial infringement."²⁰⁰ Like rational basis, the reasonable regulation standard tends to be, more than anything else, shorthand for broad judicial deference.

B. The Breadth of Deference

The paucity of contemporary state court decisions invalidating laws on the basis of the state constitutional right to bear arms illustrates the extent of the deference afforded legislatures by the reasonable regulation standard. Courts affirm the constitutionality of nearly any type of gun control, uniformly upholding bans on possession of firearms by felons;²⁰¹ total bans on the possession of particular types of firearms, including short-barreled (or "sawed-off") shotguns,²⁰² machine guns,²⁰³ stun guns,²⁰⁴ assault weapons,²⁰⁵ semiautomatic weapons,²⁰⁶ and even handguns;²⁰⁷ prohibitions on the carrying of concealed weapons;²⁰⁸ bans on the transportation of loaded firearms;²⁰⁹ bans on the possession of firearms by individuals who are intoxicated²¹⁰ and in places where alcohol is sold²¹¹ or served²¹² (including private

200. *Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266, 278 (Ill. 1984).

201. *E.g.*, *Eary v. Commonwealth*, 659 S.W.2d 198, 200 (Ky. 1983); *State v. Comeau*, 448 N.W.2d 595, 600 (Neb. 1989); *State v. Smith*, 571 A.2d 279, 280 (N.H. 1990); *State v. Ricehill*, 415 N.W.2d 481, 484 (N.D. 1987); *Perito v. County of Brooke*, 597 S.E.2d 311, 317, 321 (W. Va. 2004) (upholding felon gun ban even for a felon who has been pardoned). Some of the felon possession bans have also been challenged, unsuccessfully, under the Equal Protection Clause of the Federal Constitution. *E.g.*, *People v. Jackson*, 646 N.E.2d 1299, 1304–05 (Ill. App. Ct. 1995).

202. *E.g.*, *Carson v. State*, 247 S.E.2d 68, 72 (Ga. 1978); *State v. Fennell*, 382 S.E.2d 231, 233 (N.C. Ct. App. 1989); *Ford v. State*, 868 S.W.2d 875, 878 (Tex. Crim. App. 1993).

203. *E.g.*, *Rinzler v. Carson*, 262 So.2d 661, 666–67 (Fla. 1972); *Morrison v. State*, 339 S.W.2d 529–32 (Tex. Crim. App. 1960).

204. *People v. Smelter*, 437 N.W.2d 341, 342 (Mich. Ct. App. 1989).

205. *E.g.*, *Robertson v. City of Denver*, 978 P.2d 156 (Colo. Ct. App. 1994); *Benjamin v. Bailey*, 662 A.2d 1226 (Conn. 1995); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 166–73 (Ohio 1993).

206. *E.g.*, *City of Cincinnati v. Langan*, 640 N.E.2d 200, 205–06 (Ohio Ct. App. 1994).

207. *See Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266, 269–73 (Ill. 1984); *City of Cleveland v. Turner*, No. 36126, 1977 WL 201393, at *3–4 (Ohio Ct. App. Aug. 4, 1977) (upholding a ban on "any handgun of a .32 caliber or less and a barrel length less than 3 inches").

208. *E.g.*, *Klein v. Leis*, 795 N.E.2d 633, 636–38 (Ohio 2003); *State v. Cole*, 665 N.W.2d 328 (Wis. 2003); *State v. McAdams*, 714 P.2d 1236 (Wyo. 1986).

209. *E.g.*, *City of Cape Girardeau v. Joyce*, 884 S.W.2d 33 (Mo. Ct. App. 1994); *State v. Spencer*, 876 P.2d 939, 941–42 (Wash. Ct. App. 1994); *State ex rel. W. Va. Div. of Natural Res. v. Cline*, 488 S.E.2d 376 (W. Va. 1997).

210. *E.g.*, *People v. Garcia*, 595 P.2d 228, 230 (Colo. 1979).

211. *E.g.*, *State v. Lake*, 918 P.2d 380, 382 (N.M. Ct. App. 1996).

212. *E.g.*, *Second Amendment Found. v. City of Renton*, 668 P.2d 596, 597–98 (Wash. Ct. App. 1983).

residences);²¹³ and criminal penalty enhancements for commission of a crime while possessing a firearm.²¹⁴

If one looks closely at the reasoning of the state court decisions, the breadth of that deference becomes even clearer. As one court explained, "[b]ecause arms pose an extraordinary threat to the safety and good order of society, the possession and use of arms is subject to an extraordinary degree of control."²¹⁵ Under the reasonable regulation standard, the state courts consistently uphold even vastly overinclusive laws. A few examples illustrate this phenomenon.

1. *Bans on Particular Types of Weapons*

State courts in the modern era have uniformly upheld state prohibitions on particular types of guns, without requiring any legislative fact-finding to support the bans. A Georgia sawed-off shotgun case, *Carson v. State*,²¹⁶ is typical. "[T]he question in each [right-to-bear-arms] case," the court explained, is "'whether the particular regulation involved is legitimate and reasonably within the police power, or whether it is arbitrary, and, under the name of regulation, amounts to a deprivation of the constitutional right.'"²¹⁷ The ban on sawed-off shotguns was "not arbitrary or unreasonable" because, the court explained, such weapons are "commonly used for criminal purposes."²¹⁸ The court did not demand any evidence to back up the claim that sawed-off shotguns were "commonly used" by criminals, and did not require the government to show the prevalence of criminal use of sawed-off shotguns as compared to non-criminal use. Despite the overinclusiveness of the law, which applied to all law-abiding people, and the lack of supporting fact-finding, the ban was deemed reasonable.

Bans on one type of firearm—so-called "assault weapons"—are also incredibly overinclusive, yet courts consistently uphold them against challenge under the state right to bear arms.²¹⁹ Critics of these bans note that "[a]pppearance notwithstanding, 'assault weapons' are functionally indistin-

213. *E.g.*, *Gibson v. State*, 930 P.2d 1300 (Alaska Ct. App. 1997).

214. *E.g.*, *State v. Blanchard*, 776 So. 2d 1165 (La. 2001); *State v. Schelin*, 55 P.3d 632, 639 (Wash. 2002) (plurality opinion); *State v. Daniel*, 391 S.E.2d 90, 96–97 (W. Va. 1990). It is worthwhile to note that a defining characteristic of all the right-to-bear-arms decisions is the relatively small amount of argument courts offer to justify their determinations of reasonableness. Their reasoning is often only barely spelled out, raising the suspicion that they believe that little explanation is necessary. Such a process is typical of highly deferential review, where the conclusion that a law is valid is based primarily on the fact of deference rather than on a careful balancing of the interests.

215. *Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266, 269 (Ill. 1984) (internal quotations and citations omitted).

216. 247 S.E.2d 68 (Ga. 1978).

217. *Id.* at 72 (quoting *Strickland v. State*, 72 S.E. 260, 263 (Ga. 1911)).

218. *Id.* at 73.

219. The exact type of weapons covered by the terminology of "assault weapons" varies, and the only unifying feature of these weapons is that they share "a military-style appearance." David B. Kopel, *Clueless: The Misuse of BATF Firearms Tracing Data*, 1999 L. REV. M.S.U.-D.C.L. 171, 180.

guishable from normal-looking guns: they fire only one bullet with each press of the trigger and the bullets they fire are intermediate-sized and less powerful than the bullets from big game rifles.”²²⁰ Hunting rifles are generally exempt from assault weapons bans “because they have wooden stocks instead of black plastic and are lacking pistol grips, bayonet lugs, flash suppressors, and other sinister features.”²²¹ If the underlying objective of gun control in general, and bans on assault weapons in particular, is public safety, it makes little sense for the government to ban certain dangerous-looking guns while allowing citizens to possess other, more powerful guns. Under any kind of heightened review that demands a tight fit between ends and means, the assault weapons bans would be problematic. Under a deferential standard, however, piecemeal legislation that leaves unregulated other types of activity posing the same or greater dangers usually is constitutionally permissible.

2. Felon Possession Bans

Bans on the possession of firearms by convicted felons are the most common type of gun control regulation, and every state court in the modern era to rule on the constitutionality of this type of law has held that they are reasonable. While some state courts rule that felons are categorically excluded from the right to bear arms²²²—that is, they hold that felons do not even have a right which triggers any scrutiny—even where courts hold that felons are included within the scope of the state constitutional provisions, they uphold the bans as reasonable.²²³ Perhaps one should not be surprised that courts uphold felon possession bans in light of the unsavory characters who happen to be adversely affected by them. Nevertheless, such laws are wildly overinclusive; many felonies are not violent in the least, raising no particular suspicion that the convict is a threat to public safety. Perjury, securities law violations, embezzlement, obstruction of justice, and a host of other felonies do not indicate a propensity for dangerousness. It is hard to imagine how banning Martha Stewart or Enron’s Andrew Fastow from possessing a gun furthers public safety. Yet, despite this overinclusiveness, felon possession bans are consistently, and without exception, deemed reasonable measures of promoting public safety.

220. *Id.*; accord Bruce H. Kobayashi & Joseph E. Olson, In Re 101 California Street: A Legal and Economic Analysis of Strict Liability For the Manufacture and Sale of “Assault Weapons,” 8 STAN. L. & POL’Y REV. 41, 43 (1997).

221. Gerard E. Faber, Jr., Casenote, *Silveira v. Lockyer: The Ninth Circuit Ignores the Relevance and Importance of the Second Amendment in Post-September 11th America*, 21 T.M. COOLEY L. REV. 75, 120 (2004).

222. *E.g.*, *State v. Hirsch*, 114 P.3d 1104, 1135–36 (Or. 2005).

223. *E.g.*, *People v. Blue*, 544 P.2d 385, 390–91 (Colo. 1975); *Rohrbaugh v. State*, 607 S.E.2d 404, 413–14 (W. Va. 2004).

3. Licensing Laws

The deference embodied by the reasonable regulation standard is further indicated by state court decisions upholding licensing laws that give government officials broad discretion to reject applicants. Many states have “shall issue” licensing,²²⁴ under which the licensing official is mandated to issue a permit to carry concealed firearms to any qualified applicant. Yet even these laws sometimes condition the permit on vague, ambiguous qualifications subject to wide interpretation by licensing officials. Some states require issuance of a gun license if the applicant is of “good character and reputation”²²⁵ or is a “suitable person”²²⁶ to possess a firearm—standards that are subjective, to say the least, and far too vague to survive strict scrutiny. Yet the state courts hold that such discretion is appropriate with the right to bear arms, reasoning that, if a person is indeed of good character or suitability, the issuance is required. As the Rhode Island Supreme Court wrote in upholding that state’s mandatory licensing law, “[t]he finding that an applicant is a suitable person involves an exercise of discretion,” but “this leeway does not affect the requirement that the licensing authority shall issue a permit to a suitable person who meets the requirements set forth in the statute.”²²⁷ Although the court was not ignorant of the burden placed on the individual by this licensing, it held that the law was reasonable because “if a license is refused on the ground that a person is not suitable, this determination is subject to review by this Court on certiorari.”²²⁸ The mere availability of judicial review was enough to save the constitutionality of the law, despite conditioning the right to bear arms on subjective, ambiguous standards.²²⁹

C. The Limits of Reasonableness

So under what circumstances will state courts hold that a gun control measure is unconstitutional? According to the state courts, a law is unconstitutional if it destroys or renders nugatory the right. Although no right-to-bear-arms jurisdiction has attempted to completely disarm its populace, state courts often note that total prohibitions on gun ownership go too far and will be invalidated. Even here, however, state courts allow felons to be completely barred from possessing firearms, and one imagines the state courts would reach the same conclusion about minors or the mentally disabled. Some destruction of the right through disarmament is still countenanced. Beyond a total ban, what runs afoul of the reasonable regulation test?

224. Kopel, *supra* note 187, at 305 (2005).

225. IND. CODE ANN. § 35-47-2-3 (e)(2) (West, Supp. 2006).

226. R.I. GEN. LAWS § 11-47-11(a) (2002).

227. *Mosby v. Devine*, 851 A.2d 1031, 1048 (R.I. 2004).

228. *Id.*

229. See *Matthews v. State*, 148 N.E.2d 334, 337 (Ind. 1958).

As mentioned earlier, the state courts have invalidated gun control laws or their application to particular individuals on the basis of the state right to bear arms in only six published decisions over the past sixty years.²³⁰ We can break this down a bit more. The courts have invalidated only two types of gun control laws: total bans on the transportation of any firearms for any purpose whatsoever (three cases) and a permitting law (one case). In the other two cases, the courts upheld the underlying law but held that the law's application to particular individuals violated the right to bear arms in the unusual circumstances of those controversies. Together, these six decisions provide some insight into the limits of the reasonable regulation standard's deference.

Courts will hold unconstitutional a gun control law (or its application to a particular individual) only in extreme circumstances where (a) the law or its application is so profoundly unfair as to be arbitrary and irrational, or (b) the law or its application is so restrictive as to be effectively a destruction or nullification of the right. These categories are not mutually exclusive and the reasoning in the decisions often overlaps both.

In two modern-era cases, extremely unfair applications of otherwise valid laws have been held to violate the state constitutional right to bear arms. In *State v. Rupe*, the Washington Supreme Court reversed a death sentence because evidence was introduced at sentencing that the convict owned firearms.²³¹ The prosecution had used that evidence to support the inference that the convict was a continuing threat to the community, even though the gun was kept at home and had not been involved in the underlying crime. "We see no relation between the fact that someone collects guns and the issue of whether they deserve the death sentence," the court explained.²³² Surely, this decision reaches the right conclusion: the exercise of a constitutional right unrelated to the crime in question cannot be reason to impose capital punishment. But this decision does not seriously challenge the constitutionality of gun control, only a particularly inappropriate form of prosecutorial overreaching.

In *State v. Hamdan*, the Wisconsin Supreme Court reversed the conviction of a liquor and grocery store owner who violated the state's ban on concealed possession of a weapon by keeping a handgun hidden in his store.²³³ The court explicitly held that the concealed weapons ban was constitutional, but ruled that the unusual facts of this case made enforcement of

230. This number excludes three Oregon decisions that invalidated complete bans on weapons other than guns. *State v. Delgado*, 692 P.2d 610 (Or. 1984) (possession of a switchblade); *State v. Blocker*, 630 P.2d 824 (Or. 1981) (possession of billy club in public); *State v. Kessler*, 614 P.2d 94 (Or. 1980) (possession of a billy club in the home). For decisions upholding restrictions on weapons other than firearms, see *State v. Swanton*, 629 P.2d 98 (Ariz. Ct. App. 1981) (ban on nunchakus); *City of Cleveland Heights v. Allen*, No. 41104, 1980 WL 354859 (Ohio Ct. App. June 26, 1980) (ban on switchblades); and *City of Seattle v. Montana*, 919 P.2d 1218 (Wash. 1996) (ban on carrying "dangerous knives," concealed or open).

231. *State v. Rupe*, 683 P.2d 571, 597 (Wash. 1984) (en banc).

232. *Id.*

233. *State v. Hamdan*, 665 N.W.2d 785, 812 (Wis. 2003).

that law against this store owner "unreasonable."²³⁴ The court emphasized that the store was located in a very high-crime neighborhood of Milwaukee, that the store had been the target of four armed robberies in the previous six years (and in one of those robberies the assailant had held a loaded weapon to the owner's head and pulled the trigger, but the gun misfired), and that two fatal shootings had occurred inside the store in recent years.²³⁵ In this situation, the court explained, prosecution of the store owner for keeping a concealed weapon in his store would be "practically nullifying the right" to use a firearm for security.²³⁶ The alternative proposed by the prosecution—that the store owner could keep his handgun on the counter in plain sight next to the register—was "impractical, unsettling, and possibly dangerous" and "fails the litmus test of common sense."²³⁷

Three state court decisions have invalidated blanket bans on the transportation of firearms, loaded or not, anytime, anywhere, and for any purpose.²³⁸ Such broad laws, the courts reasoned, were so restrictive as to nullify the right. As the Kansas Supreme Court wrote, an individual had the right to own a gun, but under the blanket transportation ban he could not "lawfully transport a firearm from the place where he purchased it or had it repaired."²³⁹ The restriction was such, the Colorado Supreme Court argued, that it "would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on a substantial part of their business."²⁴⁰ Indeed, by the terms of the ordinances, an individual who moved residences had to leave the gun behind because the gun could not be packed away unloaded in a truck and moved to the new residence. According to a New Mexico decision, "the ordinance under consideration purports to completely prohibit the 'right to bear arms,'"²⁴¹ One of the three decisions suggested that that the total transportation ban was not even the result of considered public policy at all, but was due to sloppy legislative drafting.²⁴²

In light of the practical effects of a total transportation ban, these decisions are not terribly surprising. Nevertheless, a sign of the breadth of the reasonable regulation standard's deference is that several other state court

234. *Id.* at 790.

235. *Id.* at 791.

236. *Id.* at 809.

237. *Id.*

238. *City of Lakewood v. Pillow*, 501 P.2d 744, 745 (Colo. 1972); *City of Junction City v. Mevis*, 601 P.2d 1145, 1152 (Kan. 1979); *City of Las Vegas v. Moberg*, 485 P.2d 737, 738 (N.M. Ct. App. 1971).

239. *Mevis*, 601 P.2d at 1152.

240. *Pillow*, 501 P.2d at 745.

241. *Moberg*, 485 P.2d at 738.

242. *See Mevis*, 601 P.2d at 1148–49 (recognizing that the ban on any transportation appeared to result from the potentially inadvertent omission of a provision in a prior gun control measure).

decisions uphold the same type of law. Two decisions out of Ohio²⁴³ and one from gun-friendly Texas²⁴⁴ find that total transportation bans are reasonable regulations on the right to bear arms largely because of the countervailing need for public safety.

The last of the six contemporary cases—a West Virginia decision in which a basic license-to-carry law was invalidated²⁴⁵—is an outlier with little to teach us about the workings of the reasonable regulation standard. At least nine other states have considered the constitutionality of such laws and upheld them as reasonable.²⁴⁶ The reasoning of this isolated decision is thin, but as best as one can tell the court's view was that no individual rights could be made to depend upon prior authorization or permitting by the state.²⁴⁷ When it comes to the right to bear arms, however, that view is far outside the mainstream.

Taken together, the state court decisions indicate that the reasonable regulation standard is essentially a way for the courts to “stay in the game.” Although courts do not subject gun control to skeptical review, by employing a deferential standard the courts can oversee governmental regulation of the arms right and guard against extreme and excessive laws that effectively eliminate the core right to bear arms. Judicial invalidation is appropriate in extraordinary circumstances, such as when a law (or its application) works a miscarriage of justice as in *Rupe* and *Hamdan*. By maintaining a role in gun control law, the courts can serve as a check on the elected branches to insure that legislation does not eliminate the basic right. If gun control laws are excessive, the courts can break from their usual practice of deference and provide some relief for the affected individuals. Where a law is so broad as to make gun ownership—or at least gun purchasing and repair—illegal, the courts insure that the underlying right is more than illusory. The reasonable regulation standard enables the courts to act as a safety valve to counter governmental overreaching, but does not seriously interfere with legislative authority to regulate firearms in the interests of public safety.

One could construe the handful of state court decisions invalidating laws (or their application) as examples of reasonableness “with bite.” When applying rational basis review, which is deferential like the reasonable regulation standard, the U.S. Supreme Court occasionally appears to give

243. *State v. Enos*, No. 8251, 1977 WL 198812 (Ohio Ct. App. Mar. 23, 1977) (upholding a city ordinance banning the carrying of a pistol); *City of Akron v. Dixon*, 303 N.E.2d 923 (Akron County Mun. Ct. 1972) (upholding law banning the carrying of a pistol).

244. *Collins v. State*, 501 S.W.2d 876 (Tex. Crim. App. 1973) (upholding ban on the carrying of a pistol).

245. *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139 (W. Va. 1988).

246. *Davis v. State*, 146 So. 2d 892 (Fla. 1962); *State v. Mendoza*, 920 P.2d 357 (Haw. 1996); *Matthews v. State*, 148 N.E.2d 334 (Ind. 1958); *Dozier v. State*, 709 N.E.2d 27 (Ind. Ct. App. 1999); *In re Atkinson*, 291 N.W.2d 396 (Minn. 1980); *Heidbrink v. Swope*, 170 S.W.3d 13 (Mo. Ct. App. 2005); *Mosher v. City of Dayton*, 358 N.E.2d 540 (Ohio 1976); *State v. Perry*, 77 P.3d 313 (Or. 2003); *Commonwealth v. Ray*, 272 A.2d 275 (Pa. Super. Ct. 1970); *Mosby v. Devine*, 851 A.2d 1031 (R.I. 2004).

247. See *Buckner*, 377 S.E.2d at 144–45 (citing W. VA. CONST. art. III, § 22).

that test some teeth, scrutinizing challenged laws with a more skeptical eye than usual.²⁴⁸ Perhaps the state courts occasionally add teeth to the reasonable regulation standard. If so, however, the teeth soon fall out. After invalidating one law (or its application), the courts of that particular state quietly return to upholding firearms regulations. For example, subsequent to overturning a blanket ban on transportation of firearms, the Colorado courts upheld a felon possession ban,²⁴⁹ a prohibition on concealed carry,²⁵⁰ and a ban on possession by intoxicated persons.²⁵¹ As one Colorado appellate court reminded, heightened review is inapplicable; the reasonable regulation standard is “essentially” the same as “the rational basis test.”²⁵² The same reversion to deference has occurred elsewhere,²⁵³ indeed, none of the states whose decisions are discussed above have invalidated more than a single gun control law.²⁵⁴ Reasonable regulation with bite, then, is more of an isolated event than a lasting trend, and it appears that deference is an equilibrium position that is quickly reestablished.

V. RECONSIDERING HEIGHTENED SECOND AMENDMENT SCRUTINY

The federal courts are certainly capable of bucking constitutional tradition and formally adopting strict scrutiny or some other variant of heightened review in Second Amendment cases, even if this has potentially undesirable consequences. Both *United States v. Emerson*²⁵⁵ and the Ashcroft Memorandum²⁵⁶ used at least some of the language of strict scrutiny, and a Supreme Court actively reinterpreting the Second Amendment might just decide that the arms right warrants constitutional law’s most exacting standard of review or perhaps some form of intermediate scrutiny. This Part considers what heightened review in the Second Amendment context might look like and argues that, while it might require the narrowing of some gun control laws, heightened review may ultimately devolve into a reasonable regulation-like standard still deferential to legislatures.

248. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating a ban on homosexual sodomy under rational basis review); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (invalidating zoning decision that barred the creation of a group home for the disabled).

249. *People v. Blue*, 544 P.2d 385 (Colo. 1975).

250. *Trinen v. City of Denver*, 53 P.3d 754 (Colo. Ct. App. 2002).

251. *People v. Garcia*, 595 P.2d 228 (Colo. 1979).

252. *Trinen*, 53 P.3d at 757.

253. See *State v. Doile*, 648 P.2d 262 (Kan. Ct. App. 1982) (upholding ban on concealed carry three years after the state supreme court invalidated a blanket transportation ban); *State v. Taylor*, 872 P.2d 53 (Wash. Ct. App. 1994) (upholding criminal penalty enhancement for possession of weapon during commission of a crime); *State v. Thomas*, 683 N.W.2d 497 (Wis. Ct. App. 2004) (upholding felon possession ban).

254. Oregon is the only state in which the courts have invalidated more than one law under the right to bear arms over the past sixty years, and none of those decisions dealt with gun control. See *supra* note 230.

255. 279 F.3d 203 (5th Cir. 2001).

256. Ashcroft Memorandum, *supra* note 6.

A. Second Amendment Strict Scrutiny Applied

One possibility is that strict scrutiny, which has been famously characterized as “‘strict’ in theory but fatal in fact,”²⁵⁷ would lead to judicial invalidation of all or most gun control. Such a result would be unfortunate for the reasons discussed earlier: gun laws are generally motivated by legitimate public safety concerns rather than invidious purposes; the text of the Second Amendment arguably characterizes regulation as “necessary”; the history of the right to bear arms at both the federal and state level recognizes a constitutionally appropriate role for regulation, counseling against a presumption of unconstitutionality; and vigorous scrutiny would present significant federalism, separation of powers, and institutional competence problems.

Of the two prongs in strict scrutiny analysis, the fit question is likely to be the more significant in the context of the Second Amendment. Strict scrutiny’s first prong—the requirement of a compelling government interest—is likely to be found to be satisfied in nearly every case because the interest in public safety (or some variant of that goal, such as “preventing violence” or “reducing crime”) is so obviously important. As Calvin Massey asks, “[s]urely [public safety] is a compelling interest. What could be of much higher priority?”²⁵⁸ There may be some controversy over the first prong of strict scrutiny analysis, however, if courts accept the view of some in the gun-rights movement that firearms regulation is not really designed for purposes of public safety but rather as an expression of animus to gun culture.²⁵⁹ Yet, in light of the evident public safety concerns associated with gun possession, the gun-control-as-animus argument is, charitably, somewhat far-fetched.

Strict scrutiny’s second prong—the requirement of narrow tailoring—is more likely to pose a hurdle for gun control. Again, Massey writes, “[t]he degree of connection between this laudable objective and the means chosen to achieve it would likely prove to be the litigation battleground.”²⁶⁰ The fit required by strict scrutiny could conceivably impact a number of firearms laws.

A common concession of individual-rights theorists is to point to felon possession bans as the types of regulation that would remain constitutional even if the Second Amendment were reinterpreted.²⁶¹ And if there were ever a type of constitutional litigant unlikely to gain the sympathy of judges, it

257. Gunther, *supra* note 199, at 8.

258. Massey, *supra* note 39, at 1132.

259. Consider the skepticism of Justice Clarence Thomas on “assault weapons” bans. According to Justice Thomas, this terminology is devoid of any objective meaning, being only “a political term, developed by anti-gun publicists to expand the category of ‘assault rifles’ so as to allow an attack on as many additional firearms as possible on the basis of an undefined ‘evil’ appearance.” *Stenberg v. Carhart*, 530 U.S. 914, 1001 n.16 (2000) (Thomas, J., dissenting).

260. Massey, *supra* note 39, at 1132.

261. Reynolds, *supra* note 7, at 19 (banning criminals from possessing weapons would be constitutional under individual rights reading).

would be convicted felons who want to bear dangerous weapons. Yet, as noted earlier, the commonplace bans on possession of firearms by felons are overinclusive because they permit even non-violent felons to be completely disarmed.²⁶² By reaching felonies such as perjury and obstruction of justice, which do not really indicate the dangerousness of the convicted felon, these bans should be considered too broad in their reach to survive strict scrutiny. Assault weapon bans are also arguably too imprecise to satisfy the strict demands of heightened review because they exclude firearms of equal or greater danger to the citizenry.²⁶³

A recent Ninth Circuit case, *Nordyke v. King*, involved an overbroad law that could be called into question under strict scrutiny analysis: a county ordinance that barred the possession of firearms on all county property.²⁶⁴ The ban had the effect of preventing a gun show from being held on county lands.²⁶⁵ The law restricted the rights of law-abiding individuals without an established factual finding that a threat to public safety existed. This is not to say that a ban on firearms on county property is without any public safety function; the gun shows held on county property are believed to be where many criminals acquire their guns because the federal law requiring background checks before other gun purchases does not apply.²⁶⁶ Yet, there are less restrictive alternatives to a complete ban. States could require instead that background checks be mandatory for these gun shows (under state law) or limit access to such shows to people with clean criminal records.

Strict scrutiny's fit requirement might require the narrowing of laws such as the felon possession ban, assault weapons laws, county property bans, and some other forms of gun control. Yet strict scrutiny might still leave the core of modern gun control standing—or, indeed, might even be effectively watered down over time such that it looks much like the reasonable regulation standard. To find support for this hypothesis, one need only look to the few Second Amendment cases in which litigants argued for strict scrutiny and the federal courts, assuming *arguendo* that strict scrutiny might apply, considered the constitutionality of gun control under that standard. Both *Gillespie v. City of Indianapolis*²⁶⁷ and *United States v. Miles*²⁶⁸ involved constitutional challenges to the federal ban on possession of firearms by persons convicted of domestic violence or subject to a restraining order in a domestic violence case. In both cases, the judges first rejected the ar-

262. See *supra* text accompanying notes 222–224.

263. See *supra* text accompanying notes 219–221.

264. *Nordyke v. King*, 319 F.3d 1185, 1187 (9th Cir. 2003). The Ninth Circuit held that the gun show promoter lacked standing to challenge the ban in federal court because, under the collective rights view of the Second Amendment, only states had cognizable legal harm. *Id.* at 1191–92.

265. *Id.* at 1188.

266. See BUREAU OF ALCOHOL, TOBACCO & FIREARMS, U.S. DEP'T OF TREAS., GUN SHOWS: BRADY CHECKS AND CRIME GUN TRACES 26 (Jan. 1999), available at http://www.atf.treas.gov/pub/treas_pub/gun_show.pdf.

267. 13 F. Supp. 2d 811, 814 (S.D. Ind. 1998).

268. 238 F. Supp. 2d 297, 298 (D. Me. 2002).

gument that the Second Amendment protected the individual right to bear arms and that strict scrutiny applied. But then, assuming that the amendment did protect an individual right and that strict scrutiny was appropriate, the judges analyzed the challenged law and upheld it. The courts ruled the government's interest in "preventing family violence"²⁶⁹ was compelling. Moreover, as the *Gillespie* court wrote, "[t]he statute is narrowly tailored in that it applies only to persons who have been convicted previously in a court of law of a crime of domestic violence, and Congress cited many statistics linking the presence of firearms to the substantial number of deaths resulting from domestic violence disputes."²⁷⁰ According to *Miles*, the law would "easily survive strict scrutiny."²⁷¹ So much for "fatal in fact."

In *Emerson*, in which the Fifth Circuit Court of Appeals unambiguously committed to the position that the Second Amendment guaranteed an individual right and indicated that laws burdening that right must be "narrowly tailored,"²⁷² the court still upheld the law challenged in that case. That law—the same federal ban on possession by persons subject to a restraining order on the basis of past domestic violence that was the subject of *Gillespie* and *Miles*—applied to the challenger in *Emerson* even though there was no "express judicial finding that the defendant poses a credible threat to the physical safety of his spouse or child."²⁷³ While a strong narrow tailoring requirement might actually require such a showing—courts often require evidence to support the government's claim that the underlying policy is properly tailored²⁷⁴—the court allowed this law to stand.

Perhaps even more telling is the fate of other post-*Emerson* challenges to gun control in the Fifth Circuit. There have been at least three such decisions, and in each one the challenged law was upheld despite the apparent requirement of narrow tailoring. In *United States v. Darrington*, the Fifth Circuit upheld the federal ban on felon possession—a law that should be undermined by a vigorous fit requirement.²⁷⁵ In *United States v. Patterson*, the court upheld the federal law barring possession of a firearm by a user of a controlled substance.²⁷⁶ And in *United States v. Herrera*,²⁷⁷ the court upheld the same law at issue in *Patterson* over a dissenting opinion that argued the law was overbroad:

269. *Id.* at 303; see also *Gillespie*, 13 F. Supp. 2d at 827.

270. *Gillespie*, 13 F. Supp. 2d at 827.

271. *Miles*, 238 F. Supp. 2d at 303 (emphasis added).

272. *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001).

273. *Id.* at 213.

274. E.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (requiring evidentiary showing of past discrimination to justify a race-based affirmative action policy).

275. 351 F.3d 632, 633–34 (5th Cir. 2003).

276. 431 F.3d 832, 835–36 (5th Cir. 2005) (en banc) (per curiam) (deciding the case on the grounds of evidentiary sufficiency without addressing challenges to the law).

277. 313 F.3d 882 (5th Cir. 2002).

Given that there are more than 150 substances in the list of controlled substances in the Controlled Substances Act . . . and that each of these substances has widely varying and different effects on an individual, it would seem elementary . . . that Congress must specify the particular substances whose use may cause particular damages and injuries to an individual sufficient to deprive that individual of his Constitutional Rights under the Second Amendment.²⁷⁸

The dissent continued, "to have a narrowly tailored restriction on Second Amendment rights, Congress must specify the frequency of use of a controlled substance and the time period during which such a use will be deemed to have a continuing effect on an individual."²⁷⁹ Yet the majority disagreed and was willing to uphold the conviction.

Even proponents of heightened review for the Second Amendment right to bear arms reject the notion that all, or even most, forms of gun control and other weapons regulation would be unconstitutional. Nelson Lund, for example, argues that even if heightened review is applied, "most existing forms of gun control would survive such scrutiny because they are sufficiently well tailored to achieve sufficiently worthy government purposes."²⁸⁰ Massey, who argues for "semi-strict scrutiny," contends that "[a] great deal of regulation of such an individual right can, and should, be permitted."²⁸¹ According to Donald Dowd, "the reason gun control legislation would survive even [strict scrutiny] is the overwhelming public safety concern. In the context of this strict scrutiny, the Court would most likely find that public safety constitutes a compelling state interest, and legislation would pass muster on this count."²⁸²

Thus it is fair to predict that strict scrutiny in the context of gun regulation will not be overwhelmingly fatal and might even permit most, if not all, gun control laws to survive judicial review. In that case, many of the reasons that counsel against applying strict scrutiny are mitigated. Still, there would be unwelcome costs to applying strict scrutiny to gun laws if that standard lacks the vigor with which it is usually associated. Writing about a different area of law, Eugene Volokh has articulated sound reasons for courts to avoid applying what they call strict scrutiny to areas of law where the standard is truly not very strict. First, there is a "risk of confusion" as some courts might "import the strongly rights-protective traditional strict scrutiny doctrine" into this other area of law where it does not belong²⁸³—here, right-to-bear-arms cases. Second, "courts might export the watered-down" version of strict scrutiny from one area "into other cases, or, less directly, weaken strict

278. *Id.* at 889 (DeMoss, J., dissenting).

279. *Id.*

280. Lund, *supra* note 137, at 189.

281. Massey, *supra* note 4, at 587.

282. Dowd, *supra* note 47, at 111.

283. Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1500 (1999).

scrutiny in these other cases by diluting its formerly forceful symbolism.”²⁸⁴ Third, “promising strict scrutiny, with its historical connotation of extreme skepticism concerning the government action, but delivering something considerably weaker diminishes courts’ credibility.”²⁸⁵ To this we might add that legislatures may be hesitant to undertake their duty to enhance public safety by regulating weapons out of fear that strict scrutiny will in fact be fatal. Even if legislatures know that some laws survive Second Amendment strict scrutiny, the expected benefits of gun control would be discounted by the probability of judicial invalidation. If the review is not rigorous, courts should not claim to apply strict scrutiny.

B. A Brief Note on Intermediate Scrutiny

The Supreme Court could reject strict scrutiny and adopt some variation on heightened review, such as an intermediate standard that requires only important governmental ends (instead of compelling ones) and a substantial fit (in lieu of a perfect one). An intermediate level of review, however, would likely lead to only marginally different results than either strict scrutiny or even the reasonable regulation standard.

First, the governmental ends prong of the analysis would not change: public safety is already a compelling government interest sufficient to satisfy even strict scrutiny and thus would easily satisfy intermediate scrutiny.

Second, with regard to means, there may be little distinction in practice between “narrow tailoring” and something like “substantial relationship.” The fit is never going to be very precise in gun control, and courts will need to accept a large measure of overinclusiveness and underinclusiveness no matter what formal standard is applied. No law of any sort will make the public perfectly safe, and any gun control measure could go further to make people more safe from harm from guns. A law requiring safe storage could do more and require safety locks; a law requiring licensing for concealed carry could go further and ban laser sights and silencers. As Dowd recognizes, “[m]ost legislation will assert broad safety concerns and broad gun control measures to match, covering both ‘good’ and ‘bad’ gun possessors and ‘good’ and ‘bad’ guns. Such legislation cannot be narrowly tailored to reach only the bad people who kill with their innocent guns.”²⁸⁶ Moreover, due to the intensity of public opinion on guns, legislation is inevitably the result of hard-fought compromise in the political branches. To expect such legislation to reflect a tight fit between ends and means is unrealistic.

Given that most laws might be expected to survive even strict scrutiny, it is hard to imagine which cases would come out differently under an intermediate standard. If the difference between the expected outcomes under

284. *Id.*; see also *Employment Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 888 (1990) (“[W]atering [strict scrutiny] down [in religious exemption cases] would subvert its rigor in the other fields where it is applied . . .”).

285. Volokh, *supra* note 283, at 1501.

286. Dowd, *supra* note 47, at 111.

reasonable regulation and strict scrutiny is already small, there is not much of a baby to split. Intermediate scrutiny might in time simply morph into one of the extreme standards, becoming either deferential reasonableness review or slightly more demanding strict scrutiny. Indeed, one might argue that the handful of federal decisions from the Fifth Circuit purporting to apply some aspect of strict scrutiny are really applying nothing more rigorous than intermediate scrutiny already. Certainly, those cases do not require a particularly close fit between ends and means.

The state cases also support the inference that intermediate scrutiny will ultimately prove to be little more than the reasonable regulation standard. The small handful of decisions invalidating gun laws (or their application to particular individuals) might arguably be seen as applying a form of heightened scrutiny. As noted, however, such judicial skepticism does not last long, and courts, in the end, fall back to their usual stance of deference to legislatures when it comes to matters of public safety and firearms. If deferential review is, as one might suspect from this pattern, an equilibrium point, then Second Amendment heightened review seems likely to end up in the same place: reasonable regulations on the right to bear arms will be upheld as constitutionally permissible.

CONCLUSION

In an opinion in the *Nordyke* case, Ninth Circuit Judge Ronald Gould strongly endorsed the view that the Second Amendment protected an individual right to bear arms.²⁸⁷ The standard he would choose? “[A]n individual Second Amendment right” should be “subject to reasonable government regulation.”²⁸⁸

The state experience indicates that the right to bear arms in the Second Amendment is a good candidate for the test recommended by Judge Gould. This test is pervasive in American constitutionalism, uniformly applied at the state level to govern the dozens of state guarantees of the individual right to bear arms. Under this standard, the vast majority of laws burdening a Second Amendment right to bear arms are likely to withstand judicial scrutiny. Laws that effectively abolish the right to possess firearms or are applied in extraordinary factual circumstances that give rise to a sense of profound unfairness may be called into question. But outside of those narrow areas, an individual right to bear arms has not traditionally interfered with gun control. The Second Amendment may receive a second look, yet the standard of review may prove much more important to the future of gun control than the substantive construction of the underlying right. Few laws are likely to run afoul of whatever right—individual or collective—the Second Amendment is read to protect.²⁸⁹

287. *Nordyke v. King*, 319 F.3d 1185, 1192–93 (9th Cir. 2003) (Gould, J., concurring).

288. *Id.* at 1197.

289. Cf. *Chemerinsky*, *supra* note 10, at 484–85 (“It is easy to imagine a court accepting the individual rights approach and then upholding every likely gun restriction Put another way, the

Some individual-rights scholars appear to recognize this fact and support the individual-rights reading in large part for its symbolic or expressive effect. According to Calvin Massey, “[r]ecognition of a limited individual right to gun possession, however, would allay the fear of gun enthusiasts (or shooters, as they generally prefer to be called) that the ultimate aim of gun control advocates is to stamp out private gun possession.”²⁹⁰ To be sure, if the Second Amendment is interpreted to guarantee an individual right to bear arms, then a move to a British-style society with almost no lawful gun possession would be unconstitutional. Yet such a move is not anywhere near being politically feasible in America anyway. But if the forty-two states with individual-arms-right guarantees are a sign, gun enthusiasts can expect little more than a symbolic victory from a revised Second Amendment. In the American constitutional tradition, best illustrated by state constitutional doctrine when it comes to the right to bear arms, reasonable regulation has long been considered appropriate. This history of deferential review under the reasonable regulation standard is as good an indication as any that, even if the Second Amendment is reinterpreted to protect an individual right, almost all gun control laws are likely to remain constitutional.

debate between the individual and collective rights approaches to the Second Amendment might be completely irrelevant to resolving the legal issues actually likely to arise and confront courts.”).

290. Massey, *supra* note 4, at 587; *see also* Reynolds, *supra* note 7.

